THE DIVISION OF POWERS IN THE INDIAN CONSTITUTION

R. COONDOO

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Dr. Mrs. RANJITA COONDOO

M.A. (ENGLISH, CAL.), M.A., Ph.D. (POLITICAL SCIENCE, PAT.),

LECTURER, M. M. COLLEGE, PATNA

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To

My Father

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PREFACE

In this doctoral thesis I have made an attempt to refute the charge of over-centralisation brought against the Indian Constitution by eminent constitutionalists. The comparision between the Indian Constitution and those of the U.S.A., Australia and Canada, has led to the conclusion that practice has deviated from theory in all these federations.

Prof. Laski suggested that the Federal system has outlasted its utility but it is not really so. We must remember that federation is still in a process of evolution. The coming into being of new federations in the post-War (second World War) period proves the fact that it still has its utility. But there are a few characteristics of these new federations which should not go unnoticed. The insistent and constant demand of social and economic service places the states in a position of greater dependence upon the Centre than before. Dicey's classical definition of the federation which speaks about the independence of the Centre and the units thus requires modification as modern federations depend upon centre-state relation at every level. If federation is a creature of necessity, it must be remembered that "necessity" is a dynamic and not a static concept. It changes with the change of time. If federation is to stand the test of time, it must be ready to adapt itself to the changing needs of the age.

The impact of the World Wars, the modern technological revolution, and the birth of the conception of the welfare state, all these have culminated in more and more centralisation of power. The tendency of recognised authorities on Constitution like Prof. K. C. Wheare and Sir Ivor Jennings, has been to lay too much emphasis on the provisions of the Constitution and to neglect the practical developments. In this thesis I have tried to prove that no *touch-me-not* policy can be followed in the background of modern economic and social conditions. The Indian Constitution does not provide for a rigid division of powers. That shows the practical sense of the makers of the Constitution.

Prof. Laski's conception that society is necessarily federal, is nowhere better illustrated than in the Indian society, which has been formed by the fusion of many races. Hence the federal Constitution can work in India, if not in a better fashion, at least, as well as in any other country.

In writing this thesis, I have been greatly indebted to my teacher Prof. V. K. N. Menon, Director of the Institute of Public Administration, Delhi, former Head of the Department of Political Science, Patna University, who very kindly suggested the topic of my thesis, a much-talked-of problem of these days. I also offer my thanks to my teacher and supervisor Dr. P. S. Muhar, Head of the Department of Political Science, Bhagalpore University, the former Head of the Department of Political Science, P. U. for his able guidance in my research work. My special thanks are due to Bookland Private Ltd. who have kindly shouldered the responsibility of printing and publishing my thesis. I am also grateful to my numerous friends, relations and colleagues who have constantly encouraged me in my work and specially to one among them, who has devoted every breathing space in his busy, professional life to helping me in carrying on my research, without whose interest the thesis would never have been completed.

M. M. College,
Patna University. R. Coondoo.
April, 1964.

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CHAPTER I | ESSENTIALS OF FEDERATION

From the very dawn of political experiments in the laboratory of the practical world, we find political philosophers expounding various types of theories about all sorts of political problems, of which federalism occupies a prominent place. So any theoretical discussion upon the nature of a federation must necessarily begin with a distinction between any loose league of the States and a federation proper.

"Federalism in its political technique", says Sobei Mogi, "provides the solution of the essential problem of the division of political and administrative powers and functions between the central and the local authorities. . . . The problem of sovereignty and the question of decentralisation vis-a-vis centralisation all arise".[1]

The term "federal" has come from the Latin word "foedus" which means a treaty. From this it appears that when the term federation came into existence, federation as a political institution was always the outcome of a treaty between several independent sovereign bodies. Of course, by means of such a treaty, it is possible to form various types of union beginning from an international alliance and ending in a unitary state. In between these two extremes come a confederation and a federation. The nature of the union depends upon one question. That is, whether the pre-existing states would be ready to relinquish their sovereignty or not. Of course, to define federation as a treaty relation between different independent sovereign bodies would be too narrow a definition. It can be called one of the several ways in which a federation may be formed.

In our discussion of the nature of a federation, we remember two German terms. These are Staatenbund and Bundesstaat. In German the term 'staat' means a state and 'Bund' means a league and the Germans have two combinations of these words, "Staatenbund" which means a league of States and "Bundesstaat" which means a federal state. In Germany in the sixteenth

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[1] Mogi Sobei : Problem of Federalism. Vol. 2. p. 1059.

century, there was a loose league of states, the object of which was either an alliance against a common enemy or some other emergency. This was the Staatenbund. The thirteen states of America united under George Washington to fight British Imperialism. This is an example of a Staatenbund because when its purpose was achieved, it was dissolved.

In the early German federal empire there was much discussion on the problem of the central authority in a federation. Among those who discussed this issue, G. Mayer found no essential distinction between a Staatenbund and a Bundes-staat except that in the federal state, law was enforced directly by the federal authority whereas in a confederation, it was exercised through the medium of the state authorities of the individual states. Thus Mayer concentrated on the division of functions rather than that of powers.

Comparing a confederation with a federal state, Haenel asserted that a federation should sharply define its sphere of activity as compared with that of the individual states and call on the member states to co-operate in the formation of the will of the whole and regulate the behaviour of the individual states towards one another. But Haenel also asserted that the main difference between a confederation and a federation consisted of the fact that a federation should make a breach in the sovereignty of the federated states and place itself in direct relationship with the people of the states. The federal state should claim that its laws should directly bind the people without the intervention of the state authorities.

In this connection we remember the enlightened discussion of Dr. Henreich Rosin who wrote a book in 1883 in which he threw light on the nature of a federation and also made a distinction between a confederation and a federation as also between the units of a federation and the municipal authorities in a unitary state.

The first difference that he finds between a federation and a confederation is that a federation has a legal personality while a confederation is a treaty-based relationship between sovereign states for the fulfilment of some common purpose. Then comparing the central authority of the federal state with that of the decentralised unitary state, he says that there is a point of

similarity between the two in that each has a public law personality. On the other hand, the member states of a federation have a similarity with the commune of a decentralised unitary state in that both have a public law non-sovereign personality. But there is also a great difference between the two. The member states of the federation discharge functions which are considered as state tasks while the life purpose of the commune is limited to the discharge of local tasks.

Rosin, differeing from the previous theories held that "sovereignty in the federal state is not divided, rather it is vested solely in the collective state ; it is the state purposes which are divided and with them the state tasks therefrom".[2]

And so Rosin has presented his theory that because sovereignty belongs to the general authority alone, the division of state tasks is not a mechanical severence, but an organic division of functions.

J. C. Bluntschli, a great Swiss Jurist discussed the problem of federalism in his work Geschichte de Schweizerischen Bunder-screchtes in 1849. Bluntschli's main contribution to the federal idea was the distinction between a confederation and a federation. He thought that the antithesis between them was based upon the "more or less" extent of power of the central authority and upon the "more or less" extent of independence of the individual states in the union.[3]

In 1877, Theodore D. Woolsey analysed the federal system of states on the basis of juristic classification. According to Woolsey there are several forms of union. First of all, two or more states may permanently or temporarily unite for the purpose of mutual defence. This is the result of an agreement made by the parties out of their free will. This constitutes an international union. The other forms of union are what the Germans call Staatenbund and Bundes-staat.

In a federation, we have certain peculiar features. The main feature is that there are two sets of authority. Hence there should be constitutional division of powers with the provision that

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2 Quoted in Mogi Sobei : *Op. cit.* vol. I, p. 536.

3 Bluntschli : Die Geschichte de Schweizerischen Bundersrechtes, 1849. vol. I, p. 554 quoted in Mogi Sobei : *Op. cit.* vol. I, p. 365.

each member of the federation must be wholly independent in the exercise of those powers which concern itself alone but each and all must be subject to the common power of the federal government. As Woolsey said, "This central power or government of the federal union must, in the nature of the case, be the result of an agreement of parts with one another ; but when founded, it no longer depends on the desire of any one member to continue in the union".[4]

As Woolsey truly points out, the relation of the general authority and the regional authorities in a federation is essentially different from the relationship between a state and the municipalities. In fact, in a unitary state, the municipalities have no sense of independence. They are mere creatures of the Centre whereas the states in a federation have more competence and independence in so far as their powers are concerned.

Woolsey assumes that a federal government which constitutes a state over states, is an artificial construction devised by human wisdom "more complicated than any other kind of government" and presents particular difficulty because of the co-existence of states and a paramount state. He asserts that in a state formed out of states "there is not one sovereignty more but there are many sovereignties less and the supermacy is lodged in the federal union." In this connection he refers to the fact that the constitution and law of the United States are considered there as "the supreme law of the land."

This remark of Woolsey seems to be justified when we compare it with the declaration of Hamilton in the Federalist when he says, "A law, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant, to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere

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[4] Woolsey, T : Political Science or The State (1886) vol. II, p. 167. Quoted in Mogi Sobei : *Op. cit.* vol. I, p. 155.

treaty, dependent on the good faith of the parties and not a government, which is only another name for political power and supermacy."[5]

This remark may lead us to doubt the possibility of preserving the independent existence of the regional authorities in a federation where the laws of the general government are treated as the "Supreme law of the land". But these doubts and fears are dispersed when we pay attention to the next remark of Hamilton which is as follows :

"But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be acts of usurpation and will deserve to be treated as such. Hence the clause which declares the supremacy of the laws of the union . . . . only declares a truth, which follows immediately and necessarily from the institution of a federal government . . . . it expressly confines the supermacy to laws made pursuant to the Constitution".[6]

Coming to our own times, we find several modern political philosophers like Dicey, Willoughby, Mogi, Laski and Wheare discussing the characteristics of federalism from different points of view.

Dicey, in his Law of the Constitution, presents a learned discussion on the contrast between Parliamentary sovereignty and federalism and while doing so, throws much light on the concept of federalism—the conditions which are favourable to it, the aim of federalism and its special features. Dicey supports the idea that national unity can be reconciled with state independence by a division of powers under a common constitution between the nation on the one hand and the individual states on the other.

"A federal state," says Dicey, "derives its existence from the constitution, just as a corporation derives its existence from the grant by which it is created. Hence every power, executive, legislative or judicial, whether it belongs to the nation or to the

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[5] The Federalist No. XXXIII.
[6] The Federalist No. XXXIII.

individual state, is subordinate to and controlled by the constitution".[7]

According to Dicey, three consequences follow from this supremacy of the constitution, the first of which is that the constitution must almost necessarily be a "written" constitution. The reason Dicey presents is this—a federation is a complicated contract based on a treaty which involves various terms. To base such a contract on understandings or conventions may breed misunder-standings and disagreements. The articles of the treaty or the constitution must be reduced to writing. Thus "the constitution must be a written document, and if possible, a written document of which the terms are open to no misapprehension".[8]

Then Dicey discusses the necessity of a rigid or inexpansive constitution in a federation.

"The law of the constitution must be either legally immutable or else capable of being changed only by some authority above and beyond the ordinary legislative bodies, whether federal or state legislatures, existing under the constitution".[9]

As Dicey has mentioned elsewhere, the very conception of Parliamentary sovereignty involves the idea that under it, there should be no distinction between ordinary law and constitutional law. Under a federal constitution, there is no need for any ultimate sovereign power authorised to amend or alter its terms, for in every federation, the Constitution must provide the means for its own improvement. If the founders of the federal system are keen to maintain it, supreme legislative power cannot be safely vested in any particular legislative body. That will be against the principle of federalism viz. the permanent division between the spheres of the national government and of the several states. So every legislative assembly existing under a federal constitution is merely a subordinate law-making body, whose laws are by-laws, valid whilst within the limits of the authority conferred upon it by the constitution but invalid or unconstitutional if they go beyond the limits of such authority.

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[7] Dicey, A. V.: Law of the Constitution (Ninth Edition) p. 144.
[8] Dicey : *Op. cit.*, p. 146.
[9] *Ibid.*, pp. 146-147.

The distribution of powers is an essential feature of federalism. The object for which a federal state is formed involves a division of authority between the national government and the separate states. The powers given to one set of authority necessarily leads to the limitation of power of the other authority and it is not desirable that either the central government should have the opportunity of encroaching upon the rights retained by the states or the state governments should have the opportunity of interfering with the functions of the Union. So the sphere of action of both the authorities becomes the object of rigorous definition. Thus the constitution in a federation must be rigid and this supremacy of the constitution is secured by the establishment of the Supreme Court.

The Suppreme Court is the creature of the Constitution and is the ultimate point of reference in case of any dispute involving an interpretation of the Constitution. Dicey mentions this with reference to the United States of America. This is, according to him, both what is and what should be. In other words in every federation, there is the need of such a body with the ultimate power of decision in case of constitutional disputes.

Willoughby has made a distinction between Staatenbund and Bundes-staat asserting that in the former "these federated units are severally sovereign in which case the central body is wholly without this attribute" and in the latter a "so-called central, federal body possesses the sovereignty in which case the federated units are wholly without sovereignty".[10]

In a confederation, the central government is nothing more than a common organ uniting several sovereign states and established as well as preserved for carrying out certain common purposes in accordance with the authority delegated by each state. In this treaty relation, therefore, the right of nullification and secession might be justified and will be the final test of a confederation. As example of this type of loose union called a confederation, we can name the old German unions from 1815 to 1866, the Swiss confederation under the pact of 1815, and the American confederation from 1781 to 1787.

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10 Willoughby, W. W.: The Fundamental Concepts of Public Law (1924 edition) p. 192.

The federal State, on the other hand, requires the existence of a true central sovereign state.

"Therefore from a Juristic point of view, the central authority of the federal government was to be conceived as the organ of a true centralised state, not as a common organ within which the members—the states of the union had certain independent authority. In other words the central authority of the federal state exercised its own will through its own power without any interfrence from the states".[11]

Willoughby has contradicted various previous and contemporary principles of distinction between a confederation and a federation and has presented his own theory. Thus he has pointed out that the distinction which is based on the actual amount of power vested in the central government and the individual states is not a real criterion of the distinction between the two. He has also denied the validity of that distinction between the two types which is based on the fact that federal states can enforce their laws directly upon the citizens whilst in a confederation, the laws of the union government have to be enforced through the agency of the state governments. Again he has criticized the distinction which is based on enumerated and unenumerated powers. These distinctions, he says, are contrary to the actual, historical experience of federal organization*[12]

He has asserted that the read criterion is "the power or lack of power of the individual state to determine the extent of its obligations under the articles of union and in the last resort, if its view be not acquiesced in by the general government to withdraw from the union".[13]

According to Mogi, "The Confederation was a union based on the relationship of the state authorities, whilst the federal state was 'a national union' in which people participated directly in the administration of state power. Consequently sovereignty in the federal state must involve the equality of the federal and individual states within their own respective spheres of activity."[14]

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11 Mogi Sobei : *Op. cit.* Vol. I p. 193.
12 Willoughby, W. W. *Op. cit.* pp. 198-202.
13 *Ibid.* p. 202.
14 Mogi Sobei *Op. cit.* p. 388.

Laski's theory of federalism does not involve any enumeration of the characteristics of a federation or its distinction from a confederation but concentrates on a theoretical justification of the conception of a federal state. Laski's justification of a federal state is based on the ethical basis of "pragmatic utilitarianism". He stands against the idea of a sovereign state and supports the pluralistic conception. His main idea is that society is federal in nature and since "society is federal, authority must be federal."[15]

Laski's chief contribution is to overthrow the traditional idea of a monistic state. According to him "the state should not be a unitary whole on an a priori synthesis but a voluntary territorial community federal in character and distributive in technique."[16]

K.C.Wheare in his Federal Government mentions three different views about the characteristics of federalism and criticizes them. As Wheare says, according to one set of authorities the federal principle consists of the division of powers in such a way that the powers of the general government are specified and the residue is left to the regional governments. If the powers of the regional government are specified and the residue is left to the general government, that can be regarded as a violation of the federal principle. Wheare points out that according to this view, the Constitution of the United States embodies the federal principle. Wheare rightly says that this is a superficial characteristic of the American Constitution. He has mentioned the possibility of some difficulty which may accrue by such enumeration of the powers of the union and leaving the residue to the units. "When the Constitutions of the United States, Switzerland and Australia were drawn up the powers of the central legislature were specified and residual powers were left with the units, and as at this time the developments of aviation and atomic energy were unknown, they find no explicit place in the list of central powers."[17]

This is why Wheare says, "the essential point is not that the division of powers is made in such a way that the regional governments are the residuary legatees under the Constitution but that the

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15 Laski Harold : Grammar of Politics (Fourth Edition) p. 271
16 Quoted in Mogi Sobei : *Op. cit. p.* 322.
17 Wheare, K. C.: Modern Constitutions (1956 print) p. 54.

division is made in such a way that, whoever has the residue, neither general nor regional government is subordinate to the other."[18]

If we accept this principle of Wheare, we can not only say that the U.S.A. has a federal constitution but we can also call the constitution of Canada to be a federal one.

Then Wheare refers to the opinion of Lord Haldane. While delivering judgement in the case of Attorney-General for the Commonwealth of Australia Vs. Colonial Sugar Refining Company Limited in 1914, Lord Haldane said, "The natural and literal interpretation of the word 'federal' confined its application to cases in which states, while agreeing on a measure of delegation of their powers to a common government, yet in the main continue to preserve their original constitutions."

On the basis of this principle, Lord Haldane declared that Canada was not a true federation because the British North America Act 1867 created not only a new common government but also new provincial governments. If we accept this criterion, the government of India Act 1935 could not be said to have provided for a federation as the state governments in India were created anew when Provincial autonomy was introduced in 1937. According to Lord Haldane, the United States and Australia were truly federal for the state governments, after creating the general government continued unaltered except for the fact that they delegated to the general government certain specified and enumerated powers. Of course, Lord Haldane was thinking in terms of treaty between the several units in a would be federation. This was how the American federation originated and because the states had their previous existence outside the pale of the federation, they were zealous to retain as much powers in their own hands as was possible. But if we agree with Lord Haldane and presume that specified and enumerated powers would make the general governments either weak or dependent on the regional governments, then the newly created political entity would not be a federation but a confederation. In fact, the difference between a federation and a confederation is not one of degree but of kind. A federation does not mean more power for any particular authority or a confederation does not mean less power for either of the two autho-

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[18] Wheare, K. C. : Federal Government (Third edition) p. 13.

rities. The main point of difference between the two is that in a confederation, the general government is dependent on the regional governments. In a federation both the governments are independent of each other.

There is a third definition of the federal principle propounded by German writers like Mayer and Haenel which holds that in a federation both general and regional governments operate directly upon the people whereas in a league or confederation, it is the regional or state governments alone which operate directly upon the people ; the general government operates only upon the regional governments. As a criticism of this principle, we can say that direct operation of both the authorities upon the people may follow from co-ordinate and equal division of powers but it is not proper to mention it without paying attention to the more important factor of equal division of powers.

The first three definitions describe features which are found to be present in a federation but they are unimportant features. The confusion of political philosophers is due to the fact that all these definitions suit the federation of the U.S.A., the earliest type of federation, which is also recognised to be the normative federation. But we need not be too strict about our definition, nor should we assume that every federation worth the name should be an exact replica of the American system.

In fact the correct definitions of a federation seem to be those given by Bryce and Wheare. Bryce, of course, dwells on the characteristics of the American federation but what he syas of America in particular is true of all federations in general. Bryce says, "the characteristic feature and special interest of the American Union is that it shows us two governments covering the same ground, yet distinct and separate in their action. It is like a great factory wherein two sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, yet each set doing its work without touching or hampering the other."[19]

Bryce's definition, as also that of Wheare, seems to be more rational than the other definitions. A federation is a union of states by which the states hand over some of their powers to the

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[19] Bryce James : The American Commonwealth Vol. I (1928 Ed) p. 324.

general government and retain others. It may be that by way of instituting the new union, the regions have to reconstitute their own constitutions. This does not matter so long as the powers handed over to the general government are neither too much nor too little, for the first type brings about a unitary or at least a quasi-federal state and the latter establishes a confederation only. But even more important than this question of "more or less power" of the general government is the necessity of the constitutional division of powers.

If we analyse Wheare's definition, three consequences seem to follow. First of all, federation means division of powers in such a way as to give co-equal powers to both sets of authority. Secondly, in a federation neither of the two authorities should be able to change the division of powers all by itself. Here comes the question of amendment. Every constitution must contain in it some seeds of growth. Hence the necessity of the provision for amendment. But there must be some restriction in the body of the constitution against the exclusive power of one of the two authorities to change the constitutional provisions. For in that case, either of the two sets of authorities may bring about some vital change by amendment, as will shift the basis of the constitution and destroy its federal nature.

The third consequence that follows from Wheare's definition is that we must not be too strict about our idea of the federal principle. In a federation, all that is required is that the federal principle should be predominant. There may be one or more subsidiary unitary features. This does not matter so long as the main criteria are satisfied.

Thus a federation involves two sets of authority and its main problem is "how to secure an efficient central government and preserve national unity while allowing free scope to the diversities and free place to the authorities of the members of the federation."[20]

Keeping all these factors in mind, we have to judge both the Indian Constitutional provisions and their working and decide whether they satisfy the essential requirements of federalism. While doing so, we have to delve deep into the history of Indian constitu-

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[20] Bryce James : *Op. cit.* Vol. I (1928 edition) p. 356.

tion, that is, the constitutional growth during the British period and show the trend of development reaching its culminating point in the present Constitution of India, which is declared to be a Union of States. Various problems present themselves while we judge the true nature of the union, of which the first is, whether India had favourable conditions for the establishment of a federation. We propose to discuss this problem in the next chapter which will concentrate on the general requirements or prerequisites of a federation and the claim of India to have possessed such conditions before the proposal of a federation in the Government of India Act of 1935.

CHAPTER II | PRE-REQUISITES OF A FEDERATION

In this chapter we propose to deal with the pre-requisites of a Federation. In order to do so, we have to discuss the aim of federalism, the desirability of federalism, the reasons for the desire among the people to institute a general authority, the factors leading the same people to desire regional independence and in the perspective of our findings to discuss whether India satisfied the conditions essential for the formation of a federation.

When we enquire into the aim of federalism, we find it to be purely utilitarian, as John Stuart Mill says,

"Portions of mankind who are not fitted or not disposed to live under the same internal government, may often with advantage be federally united, as to their relations with foreigners ; both to prevent wars among themselves and for the sake of more effectual protection against the aggression of powerful states".[1]

This remark of Mill applies to a confederation also but we are always to keep in mind the essential difference between a federation and a confederation. The former is a stronger and more permanent union than the latter. In our first chapter, we have dealt with the difference between a federation and a confederation. Instances of federation can be found not only in European history. In ancient India also we find examples of composite and confederate states.[2] In the later Vedic period the Kurupanchalas formed one composite state under a common ruler ; the Kshudrakas and the Malavas formed a confederation to meet the invasion of Alexander, the Great. In the period of Buddha and Mahabir, the Lichhavis formed a confederation once with the Mallas and then with the Videhas. But for one thing, these confederations seem to satisfy the definition of Mill. They usually lasted for a short period. Thus the confederation among the Kshudrakas and the Malavas continued for only a century. So to be finally united or to become a

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[1] Mill, J. S.: Considerations on Representative Government p. 298.

[2] Discussed in Altekar A. S.: State and Government in Ancient India, pp. 110-113.

federation, some other reasons besides those mentioned by Mill must be operative.

Mill lays much stress on shared apprehension and the possibility of mutual defence. But Arthur W. Macmahon says, "Nevertheless man is so made that fear as motive is strangely limited ; doubtless it is for the best that it is so. At any rate, fear by itself-short of the fiery crucible—is unlikely to produce combinations that will be lasting. The problem of federation today, especially when national units are dealt with, is to find, in addition to well-justified defensive motives, the positive elements that may lie in cultural and economic conditions and needs."[3]

A federation is nothing but the union of a few small states which feel themselves to be separately insufficient to promote their general welfare like the full exploitation of the economic resources of their country, the proper development of trade and commerce as well as defence against common enemy and the like. Hence they agree to form a general government among themselves and to transfer a portion of their powers and rights to this common sovereign authority but at the same time they retain a great deal for themselves. As we have already seen in the first chapter, the peculiar characteristic of a federation lies in a constitutional division of powers in which each authority is independent of the other. Thus in a federation, there is a double set of authority and it is "a political contrivance intended to reconcile national unity and power with the maintenance of 'state rights'. The end aimed at fixes the essential character of federalism. For the method by which Federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and of state sovereignty consists of the formation of a constitution under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate states."[4]

Thus we see that "federation marks the state of stable equilibrium between certain centripetal and centrifugal forces. Both the forces must be operative, as otherwise no federation would result."[5]

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[3] Macmahon Arthur W.: Federalism, Mature and Emergent, p. 8.
[4] Dicey, A. V.: Law of the Constitution (9th Edition) p. 143.
[5] Punniah : India as a federation, p. 16. In this book Punniah deals with the proposed federation under the government of India Act 1935.

Then we come to the question of the desirability of federalism. This question again may be divided into two groups. Supposing federation is desirable, when is it desirable and assuming the desirability of federation, why is it desirable? Arthur W. Macmahon in his book *Federalism, Mature and Emergent* gives us few reasons which may make federation desirable. First of all, when diversities are pronounced and located with reasonable compactness, geographical decentralisation may lead to greater correspondence between public policy and local sentiment. Secondly this system is suitable for government over large areas. This argument (based on size) influenced the Indian Statutory Commission in 1930 which prepared the way for the Government of India Act of 1935. They said, "There is a very definite correspondence between dimension of area and population and the kind of constitution that can be operated successfully."[6]

Coming to the second part of our question, that is, why federation is desirable, we find that federation gives greater scope of experiment by multiplying independent legislative arena and secondly it broadens the opportunity for political participation by multiplying the number of elected officials. Then again "federalism lessens the risk of a monoply of political power by providing a number of independent points where the party that is nationally in the minority at the time can maintain itself while it formulates and partly demonstrates its policies and capabilities and develops new leadership."[7]

John Stuart Mill in his Consideration on Representative Government deals with some of the conditions which bring about the desire for federalism among the people of different states. The foremost among such conditions, according to Mill, is sufficient amount of mutual sympathy among the population of different states, for the federation requires them to fight on the same-side. If their feeling towards one another is such that they would be disposed to join opposite sides, then they cannot be members of one federation. In fact Mill was thinking in terms of external danger. If there is an external danger or emergency like war, it must be a common danger, a danger which will have similar type of psychological reaction on the minds of the people of all the units of the federation.

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[6] Report of the Indian Statutory Commission May 1930 Vol. II. para 23.
[7] Macmahon Arthur W : *Op. cit.*, p. 11.

The requirement to support the national government in the international field is as important for the units of a federation as it is for the citizens. Thus in America, the Supreme Court interpreting the clause on taking oath prior to naturalisation, declared that it implied also a promise to bear arms. In the United States Vs. Macintosh (1931) naturalisation was denied to a Candian, who was formerly a preacher in Canada and was at the time of application for citizenship, a teacher in Yale Divinity School. He said that he would not promise to bear arms unless he was convinced that war was morally justified.[8] In the United States Vs. Schwimmer naturalization was denied to Rozika Schwimmer, a lady of 49 who said that there were other ways of supporting the constitution than bearing arms.*[9]

No doubt, if a citizen is indifferent in time of emergency it will usher in danger to the state but the condition will be worse if the said citizen joins the enemy party in time of emergency like Bibhisana of the world-famous Indian epic Ramayana. What is true of a single citizen or a group of citizens is all the more true of the units of a federation. If one unit of a federation declines to fight for it in time of emergency, that means it has lost its faith in the general government and this may lead the state to become a rebel one. Thus the tendency of all units of an would be federation to have unflinching loyalty to the general government is one of the essential pre-requisites of a federation.

For this the states ought to have a feeling of sympathy for each other. "The sympathies available for the purpose are those of race, language, religion and above all political institutions, as conducing most to a feeling of identity of political interest."[10]

Identity or similarity of race, language, religion or political institutions may, of course, lead the different states to have the desire to form a federation but none of them is indispensable for its formation. K. C. Wheare does not think that community of language, race, religion or nationlity is essential pre-requisite for the desire of federal union. It is true these factors were present in the case of the United States of America and Australia, but the

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[8] Post Gordon, Delancy Francis P., Darby Fredryc : Basic Constitutional cases : p. 62.

[9] *Ibid.*, p. 62.

[10] Mill J. S. : *Op. cit.*, p. 298.

Americans were unconscious of any sense of nationality when their union was formed. At the beginning their exclusive loyalty belonged to their respective states. The sense of common nationality did not precede but succeeded the formation of the Union. That the difference of language is no bar against the desire for federation can be proved by the instance of Switzerland and Canada. Two languages *viz.* French and English are spoken in Canada ; Switzerland has a still greater variety of languages *viz.* German, French, Italian and Romansch. There is also difference of religion in both Canada and Switzerland as these countries are inhabited both by Catholics and Protestants. From this Wheare arrives at the conclusion that,

"Community in these matters cannot therefore be described as an essential pre-requisite of federal government".[11]

Wheare is quite right when he says that these factors are not essential in producing a desire for federation but we can support the view of Mill also on the ground that if these factors or at least some of them are present, they may help in producing sympathy among the states. From the assertion that their absence is not harmful, we cannot logically arrive at the conclusion that their presence is never beneficial. On this ground we can support both the views of Wheare and Mill.

Mill also mentions another condition for the establishment and stability of a federal union. This is that "the separate states be not so powerful, as to be able to rely for protection against foreign encroachment on their individual strength. If they are, they will be apt to think, that they do not gain, by union with others, the equivalent of what they sacrifice in their own liberty of action."[12]

The third condition to which Mill pays attention also relates to national emergency in the from of war and protection against such danger. He says that there should not be any remarkable inequality of strength among the several contracting states. It is true that they cannot be exactly equal in resources or strength. There may be gradation of power or one unit may be a little more rich or populous than the others. But "the essential is that there should not be any one state so much more powerful than the rest,

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[11] Wheare K. C. : Federal government p. 39.
[12] Mill J. S. : *Op. cit.*, p. 299.

as to be capable of vying in strength with many of them combined. If there be such a one and only one, it will insist on being master of the Joint deliberations; if there be two, they will be irresistible when they agree and whenever they differ, every thing will be decided-by a struggle for ascendency between the rivals."[13]

Thus J. S. Mill thinks more in terms of war than in terms of peace. Moreover, from his assertion, we come to the conclusion that he has greater concern for the stability of the federal union than for its establishment.

Thirdly, Mill thinks in terms of federations formed by treaty between the different units. If we rely on this criterion we cannot call Canada a federation and India will ever remain a problem child in the family of federations, because in both these cases, the provinces or units of the union were created a-new before the union itself was formed. Thus we can say that Mill's view is limited to one process for the formation of a federation. This is due to the fact that his attention like that of some other thinkers (like Haldance in the case of Attorney General for the Commonwealth of Australia vs. Colonial Sugar Refining Company Ltd in 1914) was concentrated on the American union and he had in mind the ever-brewing jealousy between the different states in American which they were complled to give up later on in order-to be able to stabilise the Constitution.

Later on we find A.V.Dicey and K.C.Wheare dealing with the same problem of federalism i.e. the pre-requisites or essential requirements for the formation of a federation. (We have already mentioned the name of Wheare in this connection but chronologically speaking, his name should come after that of Dicey).

In his Law of the Constitution, Dicey gives us his own idea about the conditions, which he thinks essential for the formation of a federation. Dicey says, "There must exist, in the first place, a body of countries such as the Cantons of Switzerland, the Colonies of America, or the Provinces of Canada, so closely connected by locality, by history, by race or the like, as to be capable of bearing, in the eyes of their inhabitants, an impress of common nationality."[14]

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[13] Mill J. S. *Op. cit.*, p. 300.
[14] Dicey, A. V. : *Op. cit.*, p. 141.

Thus Dicey unlike Wheare lays stress on the factor of nationality and dwells on the sources of the feeling of nationality. As a federation is a geopolitical entity, the geographical situation of the units of an would be federation is very important. The state of Pakistan may have every sympathy for an Islamic state like Turkey but the geographical barrier, which is no imaginary one, will surely be a hindrance against any attempt of the two states to form a federation. Like geographical neighbourhood historical affinity is important. A people who cannot look back to their past with pride, who cannot hang their picture of civilization against the back-ground of a glorious past history will not feel any sympathy towards each other for the formation of a common government. Dicey mentions race also as one of the factors in breeding the psychological atmosphere leading to the desire for a federation. But we are to notice one thing. He has said, "closely connected....by race"., and has not demanded the sameness of race. If he did so, then America, which is generally considered to be the ideal federation, would lose its claim to be called a federation for in America also we find a fusion of many races. Beacause America is a country formed by the migration of various races from Europe. In this sence "A parallelism exists between America and India—the parallelism of welding together into one body various races."[15]

India is too vast in its area and too diverse in its races. Yet India showed a spirit of toleration towards all the races from the very beginning of her history and as Tagore says, her caste system is, in fact, the result of this spirit of toleration. "For India has all along been trying experiments in evolving a social unity within which all the different peoples could be held together, while fully enjoying the freedom of maintaining their own differences.....This has produced something like a United States of social federation, whose common name is Hinduism".[16]

These races have an affinity with each other which is the outcome of sharing together for a long time the warp and woof of fortune within the boundaries of the country. Thus if we are to depend on the views of Dicey, then we can say that India showed

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15 Tagore Rabindranath—Nationalism p. 106.
16 *Ibid.*, p. 115.

similarity of race. On the other hand, if we support the view of Wheare, we can completely do away with this factor.

According to Dicey, the states which form parts of a federation were sometimes or other bound by close alliance or by subjection to a common sovereign. Dicey did not mention India in this connection because when he wrote and published the first edition of his book, *Law of the Constitution,* the idea of India as a federation had not entered even the dream of the politicians. But Dicey's definition suits no country better than India. If subjection to a common sovereign is one of the conditions leading to the psychological atmosphere for the formation of a federation, subjection to foreign rule and to a foreign sovereign are all the more conducive to the breeding of federal sentiment. In fact, inspite of being a country inhabited by many races closely allied by geography, history and culture, the people of India were never conscious of their common nationality. The idea of nationality itself is the direct outcome of English education among the Indians and it is the indirect result of the domination of the country by a foreign race. It cannot be gainsaid that nothing unified India more than her struggle for independence and this gave birth to the idea of nationalism which is one of the essential pre-requisites of a federation.

Then Dicey mentions another condition which he considers to be absolutely necessary for the formation of a federation. This is "a very peculiar sentiment among the inhabitants of the countries which it is proposed to unite. They must desire union and must not desire unity. If there be no desire to unite, there is clearly no basis for federalism. . . . If on the other hand, there be a desire for unity, the wish will naturally find its satisfaction, not under a federal, but under a unitarian constitution."[17]

Thus inspite of a sincere desire for union among the inhabitants of a few states, the union may be of a too loose or too close type. That is to say, if the different units want to retain their full sovereignty and are not ready to relax their control over the general authority, then that union is a loose union or a confederation, a union which can be easily disunited. If on the other hand, the states desiring union do not want to retain independent regional authority, then that union will mean a unitary

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[17] Dicey A. V.: *Op. cit.* pp. 141-142.

and not a federal state. If we go a little deeper into the problem, we may ask ourselves a question. What is the reason for the occurrence of such peculiar sentiment at certain places and certain periods in history as leads the people to desire union and not unity. Arthur W.Macmahon gives certain reasons for the development of local patriotism. He says that the federal character in most federations was the result of colonial development.

"The exploitative tendencics of the home government perhaps through the haphazard play of royal favoritism, encouraged the parcelling out of jurisdictions. Entrance was made at a unmber of points from which developments slowly radiated....In such ways centres of attention, action, leadership and loyalty congealed before independence....Present also in many minds was the idea that popular government could be realised best, perhaps solely in small areas which could meet the needs of defense by associating themselves for the conduct of external affairs....In Canada language and religion were more important than topography and administrative organisation in evoking the federal solution."[18]

While Macmahon was speaking of colonial development he was obviously thinking of the American federation. The people there developed local partiotism before the federation was formed and naturally they liked union and not unity, which would efface their separate existence.

Dicey also mentions legalism as one of the essential necessities of federalism. In fact in a federation where the entire constitution is based on division of powers, the importance of the judiciary as the umpire deciding the limits of the powers of each authority, cannot be exaggerated. Thus A.V.Dicey says,

"Federalism....means legalism—the predominance of the judiciary in the Constitution-the prevalance of a spirit of legality among the people."[19]

It is obvious that the first half of the sentence of Dicey viz. "predominance of the judiciary in the constitution", refers to a characteristic of the Constitution whereas the second half of the sentence, viz. "The prevalance of the spirit of legality among

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[18] Macmahon Arthur W : Federalism, Mature and Emergent, pp. 6-7.
[19] Dicey, A. V.: *Op. cit.* p. 175.

the people" refers to a pre-requisite of the federal constitution. Dicey refers to the condition in the U.S.A. and says that the courts are the pivots on which the constitutional arrangement of the country revolves.

Ivor Jennings remarks that the Indian Constituent Assembly was dominated by lawyer-politicians and that is why we find the predominance of the view of Dicey in it. "Litigation," says Jennings, "is one of the major industries of India....Law is the only profession which may be easily combined with politics. The lawyer-politician has therefore played a more important part in Indian politics than in the politics of any country in the world....Whether the dominance of the Constituent Assenbly by the lawyer-politician has been good for India must be left for history to say."[20]

Wheare makes a distinction between the desire for federation and the capacity to operate a federation. Among the reasons leading to a desire-for union, he mentions military insecurity and the consequent need for common defence ; a desire to be independent of foreign power ; a hope of economic advantage from union, some political association of the communities concerned, geographical neighbourhood and similarity of political institutions. Then he says, "these half-dozen factors all operated in the United States, Switzerland, Canada and Australia, to produce a desire for union among the communities concerned."[21]

Now, if we try to judge the claim of India to have the pre-requisites of a federation, in the light of these tests presented by Wheare, we have to keep in mind one essential factor. This is that Indian federalism was not born as a result of the coming together of independent states but of a loosening of control and power by a unified state. This unification, just like the idea of nationalism, was the creature of the British rule. Inspite of the assertion that after all conquests and treaties, there were two Indias—the British India and the Indian India, we can call pre-independence India a unified state. In order to do so, we are to remember the peculiar position of the princely states.

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[20] Jennings Ivor ; Some Characteristics of the Indian Constitution, published in 1953, pp. 24-25.

[21] Wheare K. C. : *Op. cit.*, p 37.

It is true that the princely states were not subject to legislation by British Parliament. The Crown enjoyed rights of paramountcy over them, and it could not resume in respect of the states those powers which it could resume in the case of British India. The states in 1935 could not be compelled to join the Indian federation by Parliamentary enactment. If they wised, they could join of their own accord and of their own free will. All this is true and it is also true that federation could not come into operation in 1935 partly because of the failure of the states to come to an agreement. But this was the legal position. Legally speaking, the Crown enjoyed paramountcy over the states. This means that the instrument of British control over the states was political and it acted on the government and not on the people. In theory, this control also was to be exercised at long intervals, that is to say, in case of urgent need only. But there was another side to this bright picture. The states had no external sovereignty. They could not enter into any diplomatic relation with any external power. In this sense, their fate was welded together with that of British India for any international obligation into which the British government entered was an obligation for them also. Their existence was unknown to international law. Moreover, the Paramount power interfered with their internal affairs for various purposes viz. to settle disputed succession, to suppress internal rebellion and such other purposes. Though theoretically such intervention should be a rare thing to be exercised only on rare and extreme cases, in reality such intervention was a regular feature. "It is comprehensive and pervading ; it reduces to a shadow the authority of the ruler."[22]

In order to exercise Paramountcy, the British government had a Resident stationed in each one of the states whose ostensible duty was to offer advice to the Raja in case of emergency and to prevent any mal-administration in the state but in fact, he was the master, the real sovereign of the state. Even the people in the states knew that the Resident Sahib was the master in the state and their Raja was only an honourable subordinate. So it is natural that their behaviour and attitude should take colour from this. The Political Department exercised its control in many other ways e.g.

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[22] Panikkar : Relations of the Indian States with the Government of India, p. 108.

nominating the Diwan who had independent powers in the states. Sometimes the service of British officers was lent to the states. This political instrument of control was exercised through secret channels and was veiled from public eyes. Anyhow they show that under apparent independence, the Indian states were really in subjection to the same sovereign as British India. So for all practical purpose before 1935, India was a unified state. Thus the first condition leading to a desire for federalism as mentioned by Wheare viz. a sense of military insecurity and the consequent need for common defence was not applicable to India because India was already one. The third factor *i.e.*, the hope for economic advantage also could not operate in her case, for the construction of railways in the mid-nineteenth century and its extension all over India covered the country like network and was one of the causes for ending self-sufficient village economy and making India economically unified.

The second pre-requisite for a federation as mentioned by Wheare viz. a desire to be independent of foreign power was, of course, the strongest factor in India leading to a desire for federation. It is true that we cannot call it a direct factor. In reality, the desire to be independent bred the spirit of nationalism in India and this led to a demand for federation. We have already discussed this factor of nationalism. Before leaving this point we may quote a relevant remark of Mr. Morris Jones about the birth and growth of Indian nationalism.

He writes,

"Not all of the subjects of the Indian Empire, it is true, found it easy to grasp the idea of an Indian Nation. For the man in the village, even the district town was still remote enough. But the politically relevant sections were naturally not so slow. It is noteworthy that the early stirrings of modern political activity tended to be somewhat local in character.....But the national platfrom came as soon as could be expected.

"In 1885 less than thirty years after the Mutiny, the Indian National Congress held its first session, and the work of creating a nation, rendered possible by common experience of British law and order, was begun in earnest. The early demands of the national movement were not such as to rouse all classes of the community but

they made as much sense to the professional and business classes in Bombay as to their counterparts in Calcutta. The leaders of the movement, for all the special appeal they had in their own regions, were yet all India figures."[23]

The threat of the continuance of British rule in India was thus the seed from which Indian Nationalism was born and Indians, at least the politically relevant section among the Indians, felt glory in the common revolt in the past and looked forward with hope and anxiety towards the future.

Wheare refers to "some political association of the communities concerned, geographical neighbourhood and similarity of political institutions" as pre-requisites of a federation. We have already discussed the factor of geographical neighbourhood. Coming to political association of the communities concerned and similarity of political institutions, we find the birth and growth of the Congress Party which was an all India political institution and served as an unifying force between the states. When the Congress was established in 1885, its object was "to promote by constitutional means the interests and well-being of the people of the Indian Empire". At that time the Congress was in a rudimentary stage. There was an Indian Congress Committee. It consisted of 45 members who were chosen on the basis of recommendation from the provinces. This committee consisted of a fixed number from each province. Provincial Congress committees were to be organised for the purpose of carrying on the work of political education on lines of general appreciation of British rule and of constitutional action for the removal of its defects.

Then came the national movement. It spread like fire throughout India. In 1907 the Congress itself was split up into two groups, the moderates and the extremists. The latter broke away and in 1908 Congress gave itself a new Constitution whose aims were :—

(i) The attainment by India of self-government similar to that enjoyed by the self-governing members of the British Empire and participation by her in the rights and responsibilities of the Empire on equal terms with those members.

(ii) The advance towards this goal to be by strictly constitutional means by bringing about a steady reform of the existing

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[23] Morris, Jones W. H.: Parliament in India, p. 6.

system of administration and promoting national unity, fostering public spirit and developing and organising the intellectual, moral, economic and industrial resources of the country.

Nor were all these objectives of the Congress unrealised dreams for we find them being materialised in the birth of the Indian Legislature and increasing association of the Indians in the work of administration. Dyarchy was introduced in the provinces in 1919 and full provincial autonomy was provided for in the Government of India Act of 1935, a provision which came into operation in April, 1937. So similarity of political institutions was not wanting in India.

Now, according to our definition of a federation, it is the result of two opposite forces—centrifugal and centripetal. So while discussing about the pre-requisites of a federation, we are to pay attention not only to the unifying forces but also to the forces leading to a desire for separation. In this connection, we can pay attention to the discussion by Wheare. He refers to the American states, the Swiss Cantons and the Australian states and says that inspite of their having some sort of association, prior to the union, each enjoyed a distinct history and a distinct government. In the case of India also we find some difference in the history and culture of the different parts of India. As for instance, the culture and history of South India are not similar to those of North India. Of course, we can say that this distinction had almost nothing to do with the boundaries of the pre-independence Indian provinces as they were mostly created by the Britishers as a measure of administrative facility.

As to having distinct government, we remember the Indian states. Whatever might be the real position, these states legally had internal sovereignty. They were creatures of British Imperialism, retained as a bulwork against the growing nationalist spirit and corollary demand for self-government in British India. So it was realised that when the question of the transfer of power would come, these states would become legally free and it was thought possible that they would never agree to submit themselves to the soverignty of an Indian Government which would succeed the foreign government. Thus supposing that a unitary government was established in India, there was every possibility of the states remaining outside its fold and becoming hostile enclaves in

the territory of an unified India. Thus, partly to satisfy the states, India needed a federation or altering the remark, we can say that this distinction between the government of British India and the government of the Indian states, led to the desire for regional independence within a national union.

Geographical factors also are mentioned by Wheare as responsible for separatist tendencies. He mentions the great distance in the United States, Canada and Australia in this connection and says that these countries are examples of vast territories where unitary states were difficult to be managed. India's name also can be included in this list. It would be difficult for a unitary government to establish lasting and effective control over the distant areas in such a vast country like India. This cannot be dismissed as a figment of imagination because the instance of the pre-British days in India proves our theory. The earlier empires repeatedly failed to establish proper governmental control over the distant local kingdoms which were small yet strong enough to resist the centre.

"Distance", says Wheare, "isolated the communties and developed a regional consciousness which made them desire to keep to themselves."[24]

It is true that modern technological revolution has made the world smaller. As such the parochial tendency of different regions is partly a matter of the past. Yet there are various distinctions like that of the language which lead to regional consciousness. Inspite of easier and cheaper means of communication between the different parts of the country, the linguistic difference between North and South India or between central and eastern India will ever breed a separatist tendency among the different regions. Diversity in India, though it does not coincide with the geographical boundaries of the former provinces or the present states manifest itself in various forms viz. in language, in religion, in social customs and even in food and dress. These differences are deep rooted and as such it would have been fairly difficult to fit the different regions in a system of unitary government.

"In many cases", says Wheare, "where the federal principle was applied, the units chosen as regions of the federation had been the divisions of provincial or local administration under the previous

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[24] Wheare, K. C.: *Op. cit.* p. 41.

system, which though unitary, was often highly decentralized in practice."[25]

This condition applied to the previous provinces of British India. It is also true that a process of gradual decentralization was being followed in India. As early as 1918, the Montford Report laid down four broad principles, one of which was-devolution of authority to provincial governments and introduction of partial responsibility in the provinces by dividing the provincial governments into two parts, one responsible to the Secretary of State and the other to the voters in the provinces.

As we know, in order to give effect to this policy, dyarchy was introduced in the provinces in 1919. For various reasons, this system proved a failure but one of the heritages of dyarchy was the birth of provincial politicians.

"The provincial assemblies of the 1920s may not have been popular bodies and the fact that the nationalist movement's attitude to them as institutions was generally hostile no doubt robbed them of much value. But even at that stage they served to introduce the idea of provincial affairs, even the beginnings of a provincial platform. The provincial elections of 1936, fought on a wider franchise and vigorously contested by the Congress, deepened this experience to the point of transferring it from the margins of political life to the centre. Congress governments were formed in seven out of eleven provinces, and if they were in power for only two years it was nevertheless long enough to communicate to those concerned a lively sense of the value of provincial autonomy. Not only the holders of ministerial office during 1937-39 but also the members of the provincial legislatures during that period came to appreciate the scope and importance of Government at the provincial level. It was unlikely that these men, when they came to form a significant proportion of the members of the Constituent Assembly in 1948-49, would allow much talk of a purely unitary constitution."[26]

Thus among the factors producing the desire for federalism, we find in India geographical neighbourhood, common history, similarity of political institution, a sense of common nationality, desire to be free of foreign domination as unifying factors and

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[25] *Ibid.*, p. 41.
[26] Morris-Jones W. H. *Op. cit.*, p. 17.

distinct local flavour in the history and culture of the different regions inspite of a general affinity between one another, vast expanse of the country keeping one corner remote from another, diversity in language, religion and social customs and an experience of provincial autonomy as the forces leading to a desire for regional independence.

In his chapter on the pre-requistes of a federal government, Wheare also deals with the factors which infuse the people with the capacity to work a federal government and he says, "the desire themselves provide some guarantee of the capacity to form and work the system of government desired."[27]

In this connection i.e. in his discussion of the forces lending a people the capacity to work a federal government, he mentions almost the same factors which we have discussed in connection with the desire for a federation viz. need for common defence, community of race, language, religion, nationality and similarity in social and political institutions. In fact, if sovereign, independent authorities after mature deliberation arrive at the conclusion that they should form a federal union, that is a sort of guarantee for their capacity to work it. This question of capacity should, in reality, come after the establishment of federation. Wheare, most probably, meant to say that there is a difference between desire, which is a psychologica! condition and capacity, which is the material counterpart of desire. All of our desires are not materialised for want of capacity. But in the case of federations, the desire itself is produced by certain material conditions like common nationality etc., which help the desire to materialise i.e. produce the capacity to work the union successfully and make it a stable one.

Thus India in 1947 had many of the pre-requisites of a federation. Now we are to turn over the pages of the history of India or to be more particular, the history of British India to see how she reached this stage in 1947. In our third chapter, we shall deal with certain aspects of the history of British Imperialism and its impact on India i.e. the birth of Indian Nationalism with its demand for self-government or Swaraj leading to provincial autonomy and a proposal for federation in the Government of India Act 1935.

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27 Wheare, K. C.: *Op. cit.*, pp. 44-45

CHAPTER III | THE HISTORICAL BACKGROUND

(1773—1919)

The Regulating Act of 1773 for the first time recognised the political function of the East India Company and asserted the right of the British Government to control what was so long considered to be the private possession of the Company. Before this Act was passed, there were three independent Presidency Governments, each with its separate army and political policy. The Regulating Act tried to remedy this defect by empowering the Governor-General of Fort William to superintend and control the Government and management of the Presidencies of Madras and Bombay in military, political and external affairs. It laid down in distinct terms that "it shall not be lawful for any President and council of Madras, Bombay or Bencoolen for the time being to make any orders for commencing hostilities or declaring or making war against any Indian princes or powers or for negotiating or concluding any treaty of peace or other treaty, with any such Indian princes or powers without the consent and approbation of the said Governor-General in Council."[1] Of course, this modest power over the local governments can be justified in so far as military discipline requires a monolithic structure with unquestioning obedience to the superior. But the power of the Central Government over the local governments extended further than this. "The Regulating Act also required the Madras and Bombay Governments to send to Bengal copies of all their Acts and orders ; but we cannot find that the Bengal Government had any power of modifying them."[2]

This controlling power for strictly limited purposes went on increasing as the East India Company Act of 1784 conferred the right on the Governor-General and Council to "superintend, control and direct the several presidencies and governments, now or hereafter to be erected or established in the East Indies by the

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1 East India Company Act 1773, Clause IX.
2 Report on Indian Constitutional Reforms, para 54.

said United Company in all such points as relate to any transactions with the country powers or to war or peace or to the application of the revenues or forces of such presidencies and settlement in time of war."[3]

Thus the power over revenue was a new power and it made the Central Government stronger than before by giving it control over the purse in times of emergency. The East India Company Act of 1793 further modified the system of centralisation by directing the local governments to keep the supreme government continuously informed of their proceedings and acts.[4]

At this time Parliament of the United Kingdom decided to open the gates of India to all subjects of the king. The question of European colonisation in India was discussed as early as 1813 and was opposed by the Company. In 1833 it was discussed again and supported by high officials in India like Charles Metcalfe and Lord William Bentinck. Both of them were for free admission of Europeans in India. They laid emphasis on the commercial and industrial advantages of such a step.

Various sections of Europeans had diverse interests in migrating to India. Among them we find military and naval leaders, businessmen, fightingmen, "Younger sons" of the family and missionaries. But the decision to remove all restrictions on immigration to India necessitated unity of administrative control and uniformity of the laws and judicial systems in all parts of British India. Consequently, in securing these ends, the Act of 1833 ushered in greater centralisation. In fact it reached the apogee of centralisation. The Act laid down that . . . . "the said Governor-General-in-Council shall have power to make laws and regulations for repealing, amending or altering any laws or regulations whatever now in force or hereafter to be in force in the new territories . . . . and to make laws and regulations for all persons, whether British or native, foreigners or others and for all courts of justice . . . . and for all places and things whatsoever within and throughout the whole and every part of the said territories."[5]

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[3] East India Company Act 1784 Clause XXXI.
[4] Charter Act of 1793 Clause 44.
[5] Charter Act of 1833. Clause 53.

From a cursory perusal of the various provisions of this Act, it appears that the Charter Act of 1833 wanted to grant supreme authority to the Governor-General-in-Council in many respects, but immediately after the passing of the Act, the Court of Directors sent an important Despatch to the Government of India by way of interpreting the clauses of the Act. From this commentary it appears that legislative supremacy of the Central Government was the fundamental point of the new Act.[6] With this supremacy, it was also given supervisory and controlling power over the local governments who were only left the right of proposing to the Governor-General-in-Council projects of the laws which they thought expedient.

The year 1833 is also important for the addition of one law member to the Executive Council of the Governor-General. This was the first attempt on the part of the British authority to distinguish between the executive and legislative functions of the government. Lord Macaulay became the first Law Member of the Governor-General's Council. Of course, the Law Member did not become a full member of the Council as he had no voice in ordinary executive matters. But when he sat in the Council for legislative purposes, it turned into a law-making body. Thus the provision contained the seed of the growth of the Indian Legislative Council.

"In place of three law-making executives, India thus acquired one central though rudimentary legislature. But this reform was found to have defects of its own. The members of the Governor General's Council belonged to the Bengal Service and their lack of local knowledge was felt to be a serious draw-back to the Council's handling of Madras and Bombay questions. To Lord Dalhousie belongs the credit of differentiating the legislative machine much more decisively from the executive. The Act of 1853 for which he was in great part responsible, left the Governor-General's Council as the one legislative power competent to enact laws for the whole of British India but provided for the defect disclosed in the Act of 1833 by introducing representative members from the sister presidencies. The Council when acting in its legislative capacity was enlarged by the addition

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[6] Mukherjee, P. : Indian Constitutional Documents Vol. I : The Court of Director's Despatch of 1834 pp. 105-106.

of six new members called legislative members, of whom two were English judges of the Calcutta Supreme Court, and the other four were officials appointed by the local Governments of Madras, Bombay, Bengal and Agra. This was the first recognition of the principle of local representation in the Indian legislature."[7]

Like legislative centralisation from 1833 financial centralisation also began. As Sir John Strachey said, "The whole of the revenues from all the provinces of British India were treated as belonging to a single fund, expenditure from which could be authorised by the Governor-General-in-Council alone."[8]

The evils of such centralisation, with no powers of taxation, borrowing or expenditure at the disposal of the provincial governments were many, especially because of the vastness of the country and the different levels of advancement in social and political life of the different provinces. At that time difficult means of communication severely handicapped the central government from having full knowledge of local conditions.

Thus it brought about a tough situation for the Central Government. The provincial governments tried to take advantage of the handicaps of the Central government and began to make irresponsible demands on the Central Exchequer, which they took to be a purse of unknown and therefore of unlimited depth. There was, therefore, no attempt on the part of the local governments to increase local income or economize expenditure. Thus as Sir Richard Strachey said, "The distribution of public income degenerated into something like a scramble in which the most violent had the advantage with very little attention to reason. As local economy brought no local advantage, the stimulus to avoid waste was reduced to a minimum and as no local growth of income led to local means of improvement, the interest in developing public revenues was also brought down to the lowest level."[9]

In 1858 after the administration of India passed to the Crown, the final financial control was vested in the Secretary of State.

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[7] The Report on Indian Constitutional Reforms. para 58.
[8] Strachey, Sir John : India, its administration and Progress, Third Edition, p 112.
[9] Quoted in Strachey, Sir John : *op. cit.* Third Edition, p. 113.

To secure efficient and regular disbursement of revenues, the Budget system was introduced in 1860. It authorised expenditure under each head and every departure from the estimate required the specific sanction of the Governor-General-in-Council. A Finance Department was established at the Centre to secure adherence of the local governments to the estimates in the Budget. The Finance Department had its Accounts Officer in each province whose duty it was to check every item of provincial expenditure and to see that no financial rules were violated by the spending authorities.

But the evils of such rigid control over provincial finance attracted the attention of eminent students of public administration and government officials.[10]

By 1860 the Supreme Government not only had a regular Budget system which was a machinery for financial control over the provinces but was also made responsible for all political relations with foreign or Indian States. It acquired supervisory power over local governments. It was also the sole legislative authority and the final financial power.

But in 1861 legislative devolution began. By an Act of that year, the two presidencies of Madras and Bombay were each given a Legislative Council and provision was made for the establishment of Legislative Councils in Bengal, North Western Frontier Province and the Punjab. Bengal had a legislative Council in 1862. In 1861 legislative power was restored to the Governments, of Madras and Bombay and the Bengal Council, when established, had almost the same power and privilege as the Madras and Bombay Councils. The powers of the three councils were strictly limited by various provisions of the Act of 1861. First of all, the three councils could pass laws of local application only like port regulation, municipal administration and institutions. They could not pass any law affecting the public debt of India or the customs duties or any other tax or duties imposed by the Government of India, without the previous sanction of the Governor-General. By the provisions of the Act, the Supreme Government also had the power of issuing ordinances and making rules which were as good as laws. The Governor-General had the right of vetoing any law

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10 Singh, G. N.: Landmarks in Indian Constitutional and National Development Vol. I, p. 97.

passed by the local legislature. The Government of India also wielded the concurrent power of legislation and laws or regulations passed by the local governments were treated as subordinate law. If there was a conflict between laws passed by the two authorities, the law passed by the Supreme Government had preference over that passed by the local governments. Thus the expression which A. V. Dicey used in his Law of the Constitution about the Governor-General's Council viz., non-sovereign law-making body, is more applicable to these local councils.[11] The latter were allowed to pass laws of local application. This was because the provinces were thought to be good field of experiment for new projects before trying them in the wider sphere. The Government of India was however, very cautious about its own power and took care that its previous sanction was taken in most cases. The purpose was to see that the laws passed by the local Councils were not ultra vires of the Indian Council Act or the letters Patent.

For various reasons, centralisation, not only legislative but financial and administrative, was necessary at this time. The Government of India was itself responsible to the Secretary of State and through him to the British Parliament. This necessitated a rigorous control over the local governments. To make the latter free from the control by the Central Government and make them directly responsible to the Secretary of State was prejudicial to the interest of British Imperialism in India. Hence it was impracticable and if there was to be any change in this system, that would be relaxation and not renunciation of control by the central authorities.

Secondly, political and military considerations required unity of control in India as a whole. It was because the shadow of the Mutiny was still overhanging the minds of the British authorities. The Government of India was not yet sure about the situation in the country and as such was unwilling to undergo a permanent partition of revenue and expenditure of India for this might launch them into a difficulty in times of emergency. It was felt necessary that at the shortest notice, the whole of the power and resources of India should be capable of being devoted to Imperial needs. Hence the proper regulation of finance was

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[11] Dicey, A. V.: Law of the Constitution (9th Edition) p. 99.

necessary. There was also the necessity to maintain the credit of the Indian Government for if the revenue of the country was divided among too many autonomous governments, the confidence of the British capitalists might be shaken leading to lesser investments of their capital in the public works of the land. Therefore, the Government of India was given the sole responsibility for directing the financial administration of the country.

Need for uniformity in the conditions of service also ushered in centralisation of control. For another reason, a clear demarcation of functions, at the Centre and the provinces was not possible at this stage. Indian administration was still in a state of infancy and division of functions as found in a federation was bound to be imperfect and overlapping. Thus the stage had not yet arrived for the establishment of autonomous provincial administrations as found in a federation.

But control led to friction between the Supreme and the Presidency Governments. Particularly after the Sepoy Mutiny, the local governments with their earnestness to improve the conditions of the people, felt that they were handicapped by control from above and clamoured for greater freedom. With the introduction of Western education, a new standard of civilization came into existence and there was a demand for modern means of communication, for social uplift in villages and towns, for improved facilities of schools and colleges. But the Provincial Governments were helpless before the dictates of the Supreme Government. So relaxation of the same was demanded. However, if control was to be relaxed, it was to be substituted by popular control, that is to say, the power of the local legislative councils was to be increased. After the unheaval of 1857, it was also felt necessary to keep a finger over the pulse of public opinion and understand the national reaction to every legislative, financial and administrative change and reform. For "the Mutiny had revealed the chasm that divided the rulers from the ruled in India."[12]

As Sir Syed Ahmed Khan pointed out in his book Causes of the Indian Revolt, one of the causes of the Rebellion was that the people had no voice in the Councils. The rulers were foreigners and their manners, opinions and customs differed from those of the

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[12] Coupland, R : Britan and India, p. 37.

governed. So if the rulers did not learn to adapt the laws to the thoughts and customs of the people, the laws were sure to be misunderstood. "It is from the voice of the people only," he wrote, "that the Government can learn whether its projects are likely to be well received. The voice of the people alone can check errors in the bud, and warn us of danger before they burst upon and destroy us.

"A needle may dam the gushing rivulet. An elephant must turn aside from the swollen torrent. This voice, however, can never be heard and this security never acquired unless the people are allowed to share in the constitution of the Government."[13]

Sir Syed went on elaborating the evils which issued from the non admission of Indians in the legislative Councils. There was a chance of misunderstanding. The Government could not know whether the laws and regulations passed by them had popular approval or not and the people misunderstood the views and intentions of the Government.

"They misunderstood every Act...At last the Hindustanee fell into the habit of thinking that all the laws ware passed with a view to degrade and ruin them and to deprive them and their fellows of their religion. Such Acts as were repugnant to native customs and character, whether in themselves good or bad, increased their suspicision."[14]

Sir William Hunter wrote later, "The greatest wrong that the English can do to their Asiatic subjects is not to undesstand them. The chronic peril which environs the British power in India is the gap between the Rulers and the Ruled."[15]

The evils of financial centralisation led the Government of Lord Mayo to pass a Resolution on the subject in 1870 which effected a compromise between the need of decentralisation and its practical difficulties. It transferred to the control of the Provincial Governments certain subjects which were local in character with the revenue accruing from them and in addition a fixed annual grant for the purpose. Thus the Departments of Jail, Registration,

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[13] Khan Bahadur Sir Syed Ahmed : Causes of the Indian Revolt, written in Urdu in 1858 and translated by his two European friends, p. 12.

[14] *Ibid.*, p. 14.

[15] Hunter, W. W.: The Indian Musalmans, Dedication to Hudson, Simla, 23rd June, 1871.

Police, Education, Medical Services, Printing, Roads, Miscellaneous public Improvements and Civil Buildings were transferred to the control of the local governments. The greatest defect of the system was that imperial assignment was made not on the basis of necessity but on the basis of expenditure in the provinces in 1870-71. The evils of the principle have been summarised by Gyanchand in the following words, "The province which had a low level of expenditure owing either to economical administration or to difficulty of access to the Central Government or to its undeveloped or backward state due to recent annexation was penalised for its economy, unassertiveness or worse still backwardness."[16]

To remove the defects of this system, the scheme of 1877 transferred some more heads of expenditure to the control of the local governments but there was no increase in the permanent grant. In addition to the previously transferred heads of revenue, revenues derived from excise, stamp, law and justice were now assigned to Provincial Governments. But "the arrangement, however, was purely a business one, without constitutional quality ; the Central Government determined the allocation from time to time at its own unfettered discretion and the whole appeared as one budget, the provincial expenditure making about a third of the imperial."[17]

By the settlement of 1882, the system of fixed grant was discontinued. Certain heads of revenue and a share in certain other heads were allotted to the local governments. All sources of revenue were now divided into three groups, Imperial, Provincial and Divided. Thus the system of the Division of financial administration which is followed in a federation, unobtrusively crept into the system of financial settlement.

Coming to the question of legislative reforms, we find that the Indian Councils Act of 1892 did not introduce any substantial change in the power of the Governor-General over the local legislatures. The only improvement was the introduction in the Indian Legislatures of a larger number of non-official element who were indirectly elected. They could discuss the budget but could not divide on it. There was, of course, no control of the executive by the legislature. This was not possible because it required devolu-

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16 Gyanchand—Financial system of India, p. 143.
17 Keith : A Constitutional History of India, p. 187.

tion of powers of the Secretary of State and the Government of India to local governments.

The Act of 1892 has its importance for another reason also. The Act and the regulations made under it provided that Government should nominate those persons to the Council, who have been selected by such public institutions as municipalities, district boards, universities and Association of Merchants. The object was that, "Each important class shall have the opportunity of making its views known in Council by the mouth of some members specially acquainted with them."[18]

"Directions were given that representation should be provided for certain classes and interests, among which the Muhammadans were named ; but the regulations did not confer the right of selection upon any community, and it was left to the Governor or Lieutenant Governor, after the various bodies mentioned above had made their choice, to fill the nominated seats not held by officials in such a manner as would in his opinion, secure a fair representation of the claims of the different communities."[19]

If we take the provision at its face value, it appears to be a harmless one in as much as it introduced the system of selection of members of the Council by important public bodies before their selection was finally approved by the Government. But this apparently innocent provision did not contain only the seed of self-government, with a salutary effect on the body politic, it also contained the germ of communalism by providing special representation to Muhammadans and certain other classes. We may say that this was the first step taken towards the eventual establishment of communal electorates. The authors of the Simon Commission Report also acknowledged this fact. While discussing about the effect of the Morley Minto Reforms on communal representation, they wrote, "The Scheme was merely a further application of the principle of representation by classes and interests".[20]

The local councils continued passing laws of local concern only and that also under the shadow of central control. In other

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[18] Govt. of India Despatch of 26th October, 1892 quoted in Montagu-Chelmsford Report para 227.

[19] Report of the Indian Statutory Commission 1930 Vol. 1 Part II Appendix V. para 2.

[20] Report of the Indian Statutory Commission, Vol. 1 Part II Appendix V. para 7.

words, as before the passing of the Indian Councils Act, the entire field of local legislation was effectively controlled by the Central Government. Then during the time of Lord Curzon, there was a remarkable increase in the exercise of this control over the local governments. The main policy of the Government of India at this time was to lay down general principles, leaving the local governments to apply them to local circumstances. But Lord Curzon's zeal for efficiency tightened the grip and the local governments became mere agents of the centre.

Political opinion both of the extreme and the moderate group now turned against the strict measures of Lord Curzon and adopted self-government for their goal. By this time the Congress had attained maturity as a political party and "from an attitude of prayerfulness and importunity, it developed self-consciousness and self-assertion...Starting with the humble object of seeking redress of grievances, the Congress erelong developed into the one accredited organ of the Nation that proudly put forth its demands."[21]

As early as 1885, the Congress in its first session passed this resolution—

"This Congress considers the reform and expansion of the Supreme and existing Local Legislative Councils by the admission of a considerable proportion of elected members (and the creation of similar councils for the N.W. Provinces and Oudh, and also for the Punjab) essential ; and holds that all Budgets should be referred to these councils for consideration, their members being moreover empowered to interpellate the Executive in regard to all branches of the administration ; and that a Standing Committee of the House of Commons should be constituted to receive and consider any formal protests that may be recorded by majorities of such councils against the exercise by the Executive of the power, which would be vested in it, of overruling the decision of such majorities."[22]

Then in 1904 in the twentieth Congress, a demand was made for direct representation to the House of Commons. The resolution was as follows :—

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[21] Sitaramayya Pattabhi : The History of Indian National Congress Vol. I, p. 19.

[22] Resolution No. 3 of the First Congress, Bombay, December, 1885 Quoted in Annie Besant ; How India wrought for Freedom p. 13.

"In the opinion of the Congress, the time has arrived when the people of this country should be allowed a larger voice in the administration and control of the affair of their country by (a) The bestowal on each Province or Presidency of India of the franchise to return at least two members to the English House of Commons (b) An enlargement of both the Supreme and provincial Legislative Councils—increasing the number of non-official members therein, and giving them the right to divide the Council in all financial matters coming before them, the Head of the Government concerned possessing the power of veto".[23]

As steps leading thereto, Congress demanded that there should be simultaneous examinations for civil service held in England and India, adequate representation of Indians in the Council of the Secretary of State, allowing larger and truer representation of the people, and larger control over the financial and executive administration of the country and an increase in the powers of the local bodies.

Apart from giving the people a share in the administration and some measure of responsibility in the sphere of Government, according to the national demand there was also the necessity of relieving the central government of its burden of voluminous task. Both were interconnected. If the local legislatures were to be given powers of controlling the budget, control from above was to be relaxed and this would necessitate freedom of the central government from control by the Secretary of State.

The Government of India was reluctant to grant authority to the representatives of the people. Anyhow it was not possible to check the onrush of public opinion and the Secretary of State and the Government of India appointed a Commission of Enquiry in order to investigate the possibility of decentralisation. In February 1909, the Indian Decentralisation Commission presented its comprehensive Report.

Following the recommendations of the Decentralisation Commission, the Government of India revised the provincial settlements and made some more heads wholly or partially provin-

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[23] Resolution No. IX of the Twentieth Congress, Bombay, December, 1904 quoted in Annie Besant ; *op. cit.*, p. 410.

cial. The Commission also made recommendation for improving the system of giving fixed grants. Following these recommendations, the Government of India accepted the policy that at the time of making grants, regard must be paid to the wishes of the provincial government concerned, the purposes for which the grants were made need not be the same in all the provinces and the system of imperial grant should not be regarded as a plea for greater central interferance. According to the direction of the Commission, new revised rules were issued for controlling Provincial budget. Central control was now to be confined to divided heads and to the totals only of revenue and expenditure. These were the chief modifications made by the Resolution of 1912. There was no real advancement made by this new resolution as previous system of divided heads and doles remained. Nor were the provinces given any independent power of borrowing or taxation.

Shortly before the publication of the Report of the Royal Commission, Lord Morley made a statement based on earlier correspondence between the Government of India and the Secretary of State, outlining the scheme of Constitutional reforms which the Government was prepared to concede. In order to understand the full implications of the provisions of the Morley-Minto Reforms, we are to retrace our steps one century back and follow the social and political background of this Reform. In the constitutional history of the nineteenth century India, we notice the gradual growth of the legislative councils and that of the Indian Civil Service. We also notice the monumental change in the form of the transfer of power from the hands of the East India Company to the British Crown in 1858.

But behind these constitutional changes, some extra-constitutional, that is, social and political forces were working. The most important among them was the birth of Indian nationalism in the last quarter of the nineteenth century. The spread of English education worked as the channel through which the British liberal ideas were infused in the minds of the educated Indians. The new facilities of transport also lent a helping hand to the fire of nationalism for improved means of communication meant not only cheap and quick transport of men and materials from one country to another but it meant also the transport of news and views. Already in 1833 we find the gospel of laissez faire in England and

also the doctrine of the rights of Man. In the late nineteenth centry, Bentham's philosophy of "the greatest of good of the greatest number" was afloat there and thanks to the English educated young men of India, by the end of the nineteenth century, all these were popular ideas among the upper classes of India also. Of course, even in England universal suffrage was as yet a dream of the idealists but the days of benevolent despotism were coming to a quick end and we had the repurcussions of the same in India.

As a result to the agitation carried on by the Congress, we find a change in the British policy in India, which found its expression in the Morley-Minto Reforms. It provided for the expansion of the Imperial and Provincial Legislative Councils, substantial increase in the non-official element and extension of the powers of the legislature over the budget and the administrative measures of the Government.

But the Morley-Minto Reforms injected the poison of communalism in the body politic of India and thus tried to bring about a cleavage in the ranks of Indian nationalism. If we scrutinise the history of British Imperialism in India, the reason for the introduction of communal electorate becomes obvious, Following the traditional policy of divide and rule, it was introduced to sabotage political progress in India.

From Lady Minto's diary, we understand that as early as January, 1907, Minto wrote to Morely, "The only representation for which India is at present fitted is a representation of communities as I said in my reply to the Mohammedan Deputation."[24]

Later on it was said in the Decpatch on possible Reforms in India which was sent to England on 21st March, 1907—

"The Government of India must remain autocratic ; the sovereignty must be vested in the British hands and cannot be delegated to any kind of representative assembly."[25]

The British plea for the introduction of communal electorate was that it was granted as a result of Muslim demand. But when we remember that the Muslim demand itself was motivated by the instigation of the British imperialists, that throws a new light on the problem of communal electorate.

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[24] Mary, Countess of Minto : India, Minto and Morley, 1905-1910, p. 102.
[25] *Ibid.*, p. 110.

At the first stage of British Imperialism, we see the securing of Diwani by the East India Company from the Muslim rulers but from the very beginning they followed an anti-Muslim policy for fear of the latter's rising in rebellion against these newcomers.

Then came the revolt of 1857. The rising hand various causes, political, social, economic, religious and military but the British were inspired with the idea that it was neither a national nor a Hindu revolt but a pure and simple Muslim rising and while suppressing it, they were specially ruthless to the Muslims. Infact, the Sepoy Mutiny of 1857 had shaken the British Empire to its foundation and in searching for a cause of the revolt, they discovered first of all, the disaffection of the Muslim population against the British and secondly, the combination and concerted action of certain important elements of the population. To prevent the recurrence of such dangerous combination become the chief pre-occupation of British policy.

The areas which had misbehaved were given up as recruiting ground for the Indian army ; those sections of the population which were suspected of having taken part in the rebellion, had to suffer the full consequences of their misconduct. Those who had remained loyal were favoured. For about thirty years from 1857, the Muslims were in disfavour because they were suspected of having taken a prominent part in the rebellion.

Gradually however, the British realised that the entire situation had been revolutionised and they had now to fight not against the combustible element of the Muslim communalism but against the growing strength of Westernised middle classes, the majority of whom were Hindus. The threat of Indian nationalism worked as eye opener to the British. They understood the gravity of the situation and cleverly manipulated it by appealing to one of the primary instincts of men—his jealousy. They directed the attention of the Muslims towards the manifold differences between them and the Hindu community, neglecting the fact that these two communities, inspite of all their differences, had lived together for centuries in mutual co-operation and give and take in culture and social customs and sometimes even in religious practices.

The British now inspired Sir Syed Ahmed to lay the foundation of the Mohammedan Anglo-Orient College at Aligarh in 1877

which subsequently developed into the Aligarh Muslim University. At first it was a seat of Western education for Muslim youngmen but gradually under the influence of its succeeding principals Beck, Morrison, and Archibold, it was turned into a centre of political activity. Thus after 1885, we find two simultaneous consequences of British Imperialism—one was nationalism among the upper middle classes of India, among whom the majority were Hindus and the other was the British sponsored extension of the communalism in the political field by the educated Muslims.

Under the guidance of the European Principals of Aligarh, Sir Syed Ahmed came to realise that the future of the Muslim lay in a rapproachment between the Cross and the Crescent and thus there was all along a compromising attitude. While the nationalists agitated for Swaraj or Self Government on colonial lines, the Muslims were hankering after the official loaves and fishes. Gradually with the passage of time, the Muslims began to press the Government for special treatment. The plea was the relatively backward position of their community. At first the policy of the British was not to give in. Lord Curzon said,

"There are certain things which I cannot do ; I can not create opportunities and exemptions in your favour."[26]

But official policy was soon changed in the interest of security and permanence of British rule. The year 1906 is memorable in the history of communalism for two reasons—one is the establishment of the Muslim League and the other is the famous Deputation which waited upon Lord Minto at Simla on October 1, 1906. The Deputation consisted of 35 influential Muslims from various provinces, under the leadership of H. H. Aga Khan. The Deputation made a strong claim for communal representation in case the elective principle was adopted. The grounds on which they based their claims are summarised by the Simon Commission as follows :

"(1) In the whole of India the Mohammedans amounted to between a fifth and a quarter of the population.....

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[26] Reply of Lord Curzon to the Madras Mohammedan Deputation in 1899 —Kayastha Samachar August, 1902, p. 121. Quoted in Singh G. N.: *op. cit.*, p. 189.

(2) The percentage of Mohammedans to Hindus was really larger than was usually admitted, owing to the classification of the depressed classes.....as Hindus.

(3) The importance of the Mohammedan population was shown by the fact that its number was greater than the population of any first class European State except Russia.

(4) The political importance of the community and its contribution to Imperial defence entitled it to a larger representation than that based on numbers alone.

(5) Previous representation had been inadequate and the persons nominated not always acceptable to the community.

(6) With joint electoral bodies only Mohammedans sympathetic to the Hindus would ever be elected."[27]

The Mohammedans therefore, demanded communal representation, in accordance with what they called their numerical strength, social position and local influence, in district and municipal boards, governing bodies of universities, on provincial councils and Imperial Legislative Council.

Lord Minto's reply is recognised as the first official acceptance of the Mohammedan claim for separate representation.

"You justly claim", he wrote, "that your position should be estimated not only on your numerical strength but in respect to the political importance of your community and the service it has rendered to the Empire. I am entirely in accord with you.... I make no attempt to indicate by what means the representation of communities can be obtained, but I am as firmly convinced as I believe you to be that any electoral representation in India would be doomed to mischievous failure which aimed at granting a personal enfranchisement regardless of the beliefs and traditions of the communities composing the population of this continent."[28]

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[27] Report of the Indian Statutory Commission—1930, Vol. I, Part II, Appendix V, para 3.

[28] Quoted in the Report of the Indian Statutory Commission—1930, Vol. I, Part II, Appendix V, para 3.

The committee of the Viceroy's Executive Council as well as the Provincial Governments supported the idea of communal representation but the note of dissent was sounded by Lord Morley, the Secretary of State. In a Despatch of 27th November, 1908, he accepted the principle of securing adequate Muhammedan representation but expressed doubts as to the validity of the suggestion for communal representation. He pointed out both the practical difficulty and the injustice in principle of giving such unfair advantage to one community above another. For there would be difficulties of organisation as the communities were thinly scattered and it would give the Muhammedans double vote.[29]

Lord Morley gave an alternative suggestion for securing fair representation to the Muhammedans. It was a system of indirect election with reservation of seats. He proposed that in each electoral area, an electoral college was to be established, the members of which were to be elected in communal proportion, that is to say, in the electoral college there should be a fixed number of Hindus and Muhammedans corresponding to the numerical strength of these communities in the area concerned. The members of this electoral college were to be elected by a joint electorate composed of Hindus and Muslims and other communities. These electoral colleges would, in their turn elect their representatives to the provincial councils, the members being free to vote for any candidate but the seats having been previously allotted on communal basis.[30]

The Muhammedan community took serious objection to this proposal and on 27th January 1909, a Deputation of the All India Muslim League interviewed the Secretary of State to protest against this proposed system. They presented two reasons against its introduction. The first was that joint electorates would not elect Muhammedans who fairly represented their community. The second argument was that the number in the electoral college as well as in the councils would be fixed according to the numerical strength of the Muhammedans in the country and this would be unjust to the political importance of the community. As a result of this opposition, the proposal was subsequently dropped.

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[29] Report of Indian Statutory Commission, Vol. I, Part II, Appendix V, para 5.

[30] *Ibid.*, Vol. I, Part II, Appendix V, para 5.

Referring to this matter Lord Morley said in the House of Lords.

"We suggested to the Government of India a certain plan .....It was the plan of a mixed or composite electoral college, in which Muhammedans and Hindus should pool their votes, so to say .....The plan of Hindus and Mohammedans voting together in a mixed and composite electorate, would have secured to the Mohammedan electorates, wherever they were so minded, the chance of returning their own representatives in their due proportion. The political idea at the bottom of this recommendation, which has found so little favour, was that such composite action would bring the two great communities more closely together and this hope of promoting harmony was held by men of high Indian authority and experience who were among my advisers at the India office. But the Mohammedans protested that the Hindus would elect a pro-Hindu upon it....the Government of India doubted whether our plan would work and we have abandoned it."[31]

The Act of 1909 embodied in substance the Government of India's scheme of communal representation and also retained the right of the Mohammadans to vote in the general constituencies.

As early as 1909, the Congress recorded its protest against the abominable feature of the new Reforms in the form of the communal electorate. It passed four Resolutions dealing with the Reforms. Of these the very first criticised :—

"(a) the excessive and unfairly preponderant share of representation given to the followers of one particular religion ;

(b) the unjust, invidious and humiliating distinctions made between Muslim and non-Muslim subjects of His Majesty in the matter of electorates, the franchise and the qualification of the candidates."

Proceeding further we find in 1910 and 1911 that the Congress "protested against the extension of the principle of separate electorates to District Boards and Municipalities."

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[31] Lord Morley's speech in the House of Lords on February 23, 1909 (Indian Speeches 1907-1909).

In 1912 the Congress again prayed for "the removal of the disqualification of candidates on the ground of conviction not involving moral turpitude. It reiterated the resolutions.... condemning the extension of separate electorates to Local Bodies."[32]

Inspite of all these protests, communal electorate had already been introduced in 1909 and it came to stay. Curiously enough after showing so much concern about the cankerous growth in the vital parts of the body politic in India, the Congress policy took a sudden turn to another direction.

According to Resolution XIX of the Bombay Congress (1915), a Conference was held between the All India Congress Committee and a Committee of the All India Muslim League. After the Conference, a scheme was drafted which provided for communal electorates and the Lucknow Congress of 1916 approved of this scheme.

It laid down that :—

"Adequate provision should be made for the representation of important minorities by election and the Muslims should be represented through special electorates on the provincial legislative councils in the following proportions :—

Punjab	..	One half of the elected Indian members.	
United Provinces	..	30 P.C.	,, ,,
Bengal	..	40 P.C.	,, ,,
Bihar	..	25 P.C.	,, ,,
Central Provinces	..	15 P.C.	,, ,,
Madras	..	15 P.C.	,, ,,

Bombay—one third of the elected Indian members provided that no Muslim shall participate in any of the other elections to the Imperial or Provincial legislative Councils, save and except those by electorates representing special interests."[33]

Then again the same scheme continued :

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[32] Sitaramayya Pattabhi : *Op. cit.*, Vol. I, pp. 27-28.

[33] Cl. 4 of the Reform scheme for the Provincial Legislative Councils in the Congress Leaque scheme.

"The franchise for the Imperial Legislative Council should be widened as far as possible on the lines of the electorates for Muslims for the Provincial Legislative Councils."[34]

Gokhale had accepted communal electorate in 1909. Now Lokmanya Tilak who took a prominent part in the Lucknow Pact, accepted it in 1916.

"His acceptance was based on the hope that communal electorate would only be temporary and that the Muslims themselves would soon give them up....Although the Hindus had with this hope agreed to separate electorates for the Muslims, they soon realised that, instead of promoting harmony, they had widened the gulf between them and the Muslims."[35]

There was a failure of the Indian statesmen to foresee the future. None of our leading statesmen had the foresight to see that the communal electorate was an explosive planted in the very bosom of Indian polity which when ignited was bound to blow it up into pieces.

The British view about communal electorate is represented by the statement embodied in the Report of the Simon Commission (Indian Statutory Commission). According to the members of the Commission, the reason for political rivalry and jealousy lay deeper than mere constitutional situation and if the latter was partly responsible for communalism, then hopes and aspirations raised by political reforms and not communal electorate was responsible for it.

"So long as authority was firmly established in British hands, and self-government was not thought of, Hindu-Moslem rivalry was confined within a narrower field. This was not merely because the presence of a neutral bureaucracy discouraged strife. A further reason was that there was little for members of one community to fear from the predominance of the other. The comparative absence of communal strife in the Indian states today may be similarly explained....But the coming of the Reforms

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[34] Cl. 3 of the Reform Scheme for the Imperial Legislative Council in the Congress League scheme.

[35] Constitutional proposals of the Sapru Committee ; Paragraphs 138-139.

and the anticipation of what may follow them have given new point to Hindu-Moslem competition."[36]

There seems to be little truth in the attempt made in the Report of the Simon Commission to prove that the introduction of communal electorate was not responsible for widening the gulf between the Hindus and the Muslims.

Previous history tells us about the British policy of alternately favouring one community and suppressing another. This supports the theory that introduction of communal electorate was a deliberate attempt to sow seeds of dissension.

Later on Mr. Montagu, the Secretary of State for India again and again admitted the evil effect of communal electorate.

"We must," he wrote, "beware of this system which Morley introduced, for it is fatal to the democratisation of institutions and causes disunion between the Hindu and the Mohammedan, and we must not extend it more than we can help."[37]

Montagu wrote this when the Deputation from the All India Conference of Indian Christians demanded communal electorate for themselves. Then when he was touring Madras, the Roman Catholics came to him with the same prayer and he wrote,

"They all want communal representation for the Indian Christians, with the exception of Waller, the Bishop of Tinnevelley, who admits that it is a bad method. I will not have any more communal representation. It was designed mistakenly, I think, to give protection to backward communities. The Indians ought to stand on their own legs ; they are thoroughly well-educated and intelligent."[38]

In fact to grant communal electorate to the Mohammedans and deny it to the other communities on the above mentioned grounds was itself a half way house which cannot be defended. But while denying to extend it to other communities like the Anglo Indians, Indian Christians or non-Brahmans in Madras, Montagu admitted that it was bad in principle and "causes dissension between the Hindu and the Mohammedan."

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36 Report of the Indian Statutory Commission, Vol. I, Part I, para 43.
37 Montagu Edwin : An Indian Diary, Dec. 11. 1917.
38 Montagu Edwin : *Op. cit.*, December 18, 1917.

Montagu wrote that he was reluctantly agreeing to grant it to the Muslims because the British were pledged to grant it to the former as a result of the Muslim demand. But it was later found out that the demand of the famous Deputation which waited upon Lord Minto at Simla on October 1, 1906, was prompted by the British authorities. In 1923 Maulana Mohammed Ali admitted that the Deputation was a "command performance."

"It is now a matter of common knowledge that this Deputation was not altogether spontaneous but was inspired from Simla. In a letter to Nawab Mohsin-Ul-Mulk, dated 10th August, 1906 Mr. Archbold, the then Principal of the M.A.O. College, elaborated the idea of this deputation. He also informed the Nawab that the proposal had the blessings of the Government."[39]

Earlier Mr. Beck, Principal of the same college betrayed himself in the following terms, "It is imperative for the Muslim and the British to unite with a view to fighting these agitators and prevent the introduction of democratic form of government, unsuited as it is to the needs and genius of the country. We, therefore, advocate loyalty to the government and Anglo-Indian collaboration."[40]

As it was admitted by the Simon Commission, Hindu Muslim rivalry was confined within a narrower field before, that is, in the social and religious field. To extend it to the political field was something new, although the British tried to misrepresent the fact. In his attempt to prove that India was not fit for Parliamentary Government which presupposes majority rule, Coupland writes :—

"More daunting were the old, intractable communal differences and antagonisms—more daunting because until the religious communities could learn to keep faith and politics apart, not only would that indispensable stretch of common ground be lacking, but the members of a minority could never hope, except by the unthinkable process of coversion, to be in a majority."[41]

But confusion between faith and politics was completely a Western idea and by introducing communal electorate the British were trying to inject this poison in Indian politics.

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[39] Constitutional Proposals of the Sapru Committee para 125. (Published in December, 1945).

[40] Constitutional Proposals of the Sapru Committee, para 124.

[41] Coupland, R.: Britain and India, p. 60.

In fact at this time there was no dearth of nationalist minded Muslims. The members of the Muslim Deputation of 1906 pointed out that joint electorate would not elect the Mohammedans who would satisfactorily represent their community and also critised the proposal of the Muslim representation being fixed on a population basis which was according to them unjust to the military and political importance of the Mohammedans in India.

This shows that they were afraid that religious diehards and fanatics would not pass through the seive of joint electorates. Why were the members of the Deputation as well as other supporters of communal electorates so much afraid of Mohammadans being influenced by the views of the Hindus ? This shows that a significant section of the Mohammedans were nationally-minded which was misrepresented by the staunch supporters of the communalism as sacrifice of the Mohammadan views to the views of the Hindus.

The Simon Commission points out that in considering the Moreley-Minto Reforms we are to remember few things, one of which is "The political importance of the community and its contribution to Imperial defence entitled it to a larger representation than that based on numbers alone."[42]

After the introduction of communal electorates in 1909 but before the Simon Commission made the above remark in their Report, when the question of giving responsible government to India was being discussed in England, that is, just before the Montagu-Chelmsord Reforms were introduced, Lord Curzon refused to consider the question of military assistance given to the Allies by the Indians in the first Great War. "The generally accepted view that political concessions were due as a reward for the part played by India in the war, be brushed aside. Indian soldiers have redered loyal and valiant service in the various theatres of hostilities ; but Indian soldiers were the last people in the world to hanker after political concession."[43]

If responsible government could be denied to the whole of India ignoring its military importance, why were Mohammedans granted favour on the same ground ? Then again to base election

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[42] Supra page 49.
[43] Ronaldshay : Life of Lord Curzon, Vol. III, pp. 162-163.

on such a subjective element as political importance in contrast with the objective element of number seem to be unjustifiable in principle as the standard of judgment in such case was bound to be uncertain because the British authorities could not be expected to be impartial judges of the contribution of any community. If returning members to the Council could be claimed as a right of the people (of either community) and not as a favour granted according to the caprice of the British authorities, method of election could not depend on such an uncertain standard as the political importance of any community.

When the Deputation of the London Branch of the All India Muslim league waited upon Lord Morley, the Secretary of State in order to represent to him the views of the Mohammedans of India on the projected Indian reforms, he also said :—

"No general proposition can be wisely based on the possession by either community, either of superior Civil qualities or superior personal claims. If you begin to introduce that element you perceive the perils to that peace and mutual goodwill which we hope to emerge by and by, though it may take longer than some think. I repeat that I see no harm from the point of view of a practical working compromise, in the principle that population or numerical strength should be the main factor in determining how many representatives should sit for this or the other community."[44]

The view of the Simon Commission that because there was no Reform in the Native States, so there was no demand for communal electorate, can be said to represent half truth only. Reform in British India meant introduction of direct representation. Hence the fear of the British imperialists from the Indian Nationalists and introduction of communal electorate resulting in an increase of communal feeling. In the Native States there was no Reform. Hence no fear of the British imperialists and no communal electorate with no militant attitude between the Hindus and Muslims.

Apart from what was disclosed by Maulana Mohammad Ali about the Muslim Deputation of 1906, it is rather unbelievable that politically immature as the Indians (both Hindus and

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[44] Lord Morley's Speech at the India Office January, 1909 (Indian Speeches 1907-1909).

Mohammedans) were at that time, they should have thought about some constitutional safeguards in such a clear way as to demand the introduction of communal electorate.

From all these it appears that the British prompted the Mohammadans to claim communal electorate and its introduction was responsible, if not for the birth of communal feeling, at least for aggravating it and introducing it in the political field. The question of communal electorate interests us in retarding political Reforms and indirectly hampering the introduction of federation.

Another point which deserves mention is the reasons why Morley gave in to Minto. Ramsay Macdonald makes the Anglo-Indian officials responsible for introducing communalism in Indian politics. He writes," the Mohammedan leaders are inspired by certain Anglo-Indian officials, and these officials have pulled wires at Simla and in London".[45]

It seems that influential Anglo-Indian officials put pressure on the Government and Morley could not withstand the onrush of their opinion.

For various reasons the Morley-Minto Reforms failed to satisfy the Indian public. Among them we find no relaxation of control from above, retention of official majority and introduction of communal electorate. "In nine years," wrote the authors of the Montagu-Chelmsford Reform," the Morley-Minto reforms have spent their utility. They are no longer acceptable to Indian opinion ; and in the light of experience official opinion also views them with a critical eye. We judge that this is due in varying degrees to the political development brought about by the reforms themselves, to the precipitation of democratic feeling caused by the war, to some inherent features of the scheme of reforms itself and to Lord Morley's assertion that these reforms were not meant to lead to Parliamentary Government."[46]

In fact Lord Morley is said to have openly announced "if it could be said that this Chapter of Reforms led directly or indirectly to the establishment of a parliamentary system in India, I for one, would have nothing to do with it."[47]

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[45] Macdonald J. Ramsay : The Awakening of India, p. 284.
[46] Report on Indian Constitutional Reforms in 1918, para 74.
[47] Speech in the House of Lords, 17th December, 1908.

This policy of introducing Constitutional Reforms and at the same time withholding parliamentary form of government ushered in some anomalies in the working of Government. Lord Morley's Act empowered the Councils to discuss the budget, to propose resolutions on it and to divide upon them. On all other matters of general importance also resolutions might be proposed and divisions taken. The resolutions were to operate as recommendations to the executive government. Thus the old conception of the Council as a mere legislative committee of the government, was abandoned but the Council was formed by narrow franchise and indirect election. Thus the members had no sense of responsibilities to the people generally. Government was also exposed to criticisms which were "uninformed by a real sense of responsibility, such as comes from the prospect of having to assume office in turn. The conception of a responsible executive, wholly or partially amenable to the elected councils, was not admitted. Parliamentary usages have been initiated and adopted in the Councils upto the point where they cause maximum of friction, but short of that at which by having a real sanction behind them, they begin to do good."[48]

Thus the Morley-Minto Reforms failed to satisfy either the Indian Nationalists who wanted full responsible Government or the official block which was now exposed to hostile criticism. The Congress had already set its goal as "a system of Government similar to that enjoyed by the self-governing members of the British Empire" and this ideal was retained by them even after their constitution was reformed in 1911, 1912 and 1915. In 1914 the first World War broke out and India's contribution in men and money led to two types of reaction in the Indian mind. "It kindled a sense of reward in the mind of some, such as Surendranath Banerjea, and a sense of rights in the minds of others, such as Mrs. Besant."[49]

The remarkable feature of Indian politics at this time was the agreement between the Congress and the Muslim League about political reforms which came to be known as the Lucknow Pact. Among the demands presented, we find that the Provinces should be freed as much as possible from Central control in administration

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48 Report on Indian Constitutional Reforms 1918 para 81.
49 Sitaramayya Pattabhi : *Op. cit.*, Vol. 1, p. 119.

and finance and the Governments, Central and provincial should be bound to act in accordance with resolutions passed by the Legislative Councils unless they were vetoed by the Governor-General or Governors-in-Council, and in that event, if the resolutions were passed again after an interval of not less than one year, they should be in any case put into effect.

The situation of India in 1917 required the Viveroy to press the British Government to consider another advance in Indian policy and for an early statement of the same. Then the secretary of State invited the attention of his colleagues in the following words, "It is not too much to say that upon a right decision at this critical time depends the peace and contentment, of India for years and perhaps generations to come."[50]

Lord Curzon agreed that it was desirable for the Government to declare that its aim was to grant responsible Government to India as a part of the British Empire.

Some of his colleagues took objection to the term responsible Government because it had acquired a technical meaning in the British Constitutional law. This meaning was parliamentary system of Government on a democratic basis. The Secretary of State understood the difficulty of interpreting the word "responsible" but "as to a formula for the purpose of making known the policy of the Government, he did not think it possible to be more precise than to avow an intention to foster the gradual development of free institutions with a view to self-government."[51]

But the formula was redrafted into the following words and later on announced by Mr. Montagu in the House of Commons on August 20, 1917. "The policy of His Majesty's Government with which the Government of India are in complete accord, is that of increasing association of Indians in every branch of administration and the gradual development of self-governing institutions with a view to progressive realisation of responsible Government in India as an integral part of the British Empire."

The important change was the replacement of the expression "free institution" by the term "responsible". The person who

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50 Quoted in Ronaldshay : Life of Lord Curzon, Vol. III, p. 162.
51 Ronaldshay : *Op. cit.*, Vol. III, p. 165.

suggested this redraft was Lord Curzon. His introduction of the term "responsible" in association with "Self Government" could only have meant that parliamentary system of government was aimed at. Yet Lord Curzon failed to see this obvious implication of his own statement for he criticized the scheme of Montagu and Chelmsford which aimed at introducing Parliamentary Government as a "daring experiment", disregarding the fact that the pronouncement of August 20 was based on his own suggestion. His fear was that the standard of Government would fall. If we keep in mind Lord Curzons's zeal for efficiency, we can well understand his anxiety at this supposed deterioration in the standard of government. But the reason of his suggesting introduction of the term "responsible" remains a mystery. As Keith says, "The term responsible government was, of course, vital. It had a perfectly well known meaning, as connoting the form of Government in the great Dominions and if Lord Curzon did not understand that it essentially implied parliamentary Government, his ignorance was surprising."[52]

His biographer Ronaldshay suggests that he realised that the modern idea of Nationalism and self-determination which were having their sway in India at that time attached much more importance to being governed, if not so well governed, by themselves. If we judge the behaviour of Lord Curzon in the light of Lord Ronaldshay's statement, it appears that he used the word "responsible" as a stunt to appease the nationalists and depended much on the expression "progressive realisation" which did not set any time limit to the introduction of the responsible government.

But inspite of this flat denial to grant India self government on colonial lines, it was not possible for the British to postpone indefinitely the question of further political reform. The scheme of reform suggested by Gokhale with its modest demand for provincial autonomy in the narrow sense of the term, that is, in the sense of relaxation of control from above, was published shortly before his death. The Congress League scheme on the other hand, demanded full legislative and financial powers for the provincial Legislatures and also the right to direct the Provincial Executive Governments by means of binding resolutions.

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[52] Keith, A. B.: A constitutional History of India, p. 243.

Both these schemes were rejected and the Reforms of 1919 were based on the suggestion of Sir William Duke. The scheme is famous in constitutional history as the Duke Memorandum. The Duke Memorandum recommended the following :—

"There are certain departments of government, the integrity and efficiency of which are so vital to the British connexion, that in existing conditions they could not be submitted to popular control, desirable as the control may be in other parts of the field. It is also the case that in all the great Provinces, although in their constitution they have the same element of popular representation as Bengal and similar need for its expansion, there are also large districts inhabited by primitive races which are entirely excepted from that system and are governed by the Executive purely autocratically under different and often very elementary codes of law. There is no prospect that within any assignable period any considerable part of these areas will be able to share in the progress towards autonomy which we contemplate.

"These two conditions.....bring us to an alternative which has been suggested. It is that for these departments in which it can be done safely, some form of responsible government as distinct from merely representative government should be instituted forthwith, while the remaining departments and the excepted areas would continue to be administered under the present system, the functions of constitutional ruler in the one case and of actual administrator in the other being united in the person of the Governor. The type of responsible Government might be as liberal as the degree of development of the people would warrant."[53]

The cardinal features of the Reform were partial relaxation of control by the central government and the introduction of partial responsible government in the provinces. To give full effect to the principle of Provincial self-government, devolution of authority from the Centre was now for the first time given a legal and precise form. The existing division of functions was not exactly changed but it was clarified by lists of Central and Provincial subjects. Subjects of administration and sources of income also were divided into two classes-Central and Provincial

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[53] Quoted in Curtis Lionel : Dyarchy, p. 18.

In the provinces a unique system of government called Dyarchy was introduced. Dyarchy is a compound of two Greek words "DI" which means twice and "Archia" which means rule. So Dyarchy meant government by two rulers. The authors of the Joint Report wrote in 1918 "If responsible Government cannot be conceded at once, as indeed the scheme implies, and if some measure of responsibility is yet to be given, then means must be found of dividing the sphere of administration into two portions, and for each of these there must be a part of the executive which can in the last resort secure its way from a legislative organ which is in harmony with it and there must be means of securing that both halves of the machine work together."[54]

Thus we see that the whole of the Provincial government was divided into reserved and transferred Departments. That is to say, certain provincial subjects were administered by members of the Executive Council who were selected independently of the legislature and were not responsible to that body. The sole responsibility in other matters rested with ministers chosen from and accountable to the legislative council for their proper administration.

But for various reasons, provincial autonomy neither in the sense of relaxation of control from above nor in the sense of responsibility of the provincial executives to the provincial legislatures, was fully realised. The division of powers and functions between the Centre and the Provinces were not so definite or so rigid as in a federation because whenever a doubt arose as to whether a particular matter was central or provincial, the question was to be decided by the Governor-General-in-Council whose decision was to be final. Again certain provincial subjects were made subject to Indian legislation and previous sanction by the Governor-General-in-Council was necessary for this purpose. The Governor also had the right to reserve any bill for the consideration by the Governor General. Then again the responsibilities of the Government of India required it to be kept informed of all important matters connected with the Government of the whole country, even when mainly of provincial concern. The obligation to supply information on all subjects was imposed by statute (Section 45 of the Act) and also by rule (number 5 of the Devolution rules) on

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[54] Report on Indian Constitutional Reforms, para 174.

both halves of the Provincial Governments. Administration of certain subjects of all India importance like All India Service necessisated the administration of some provincial subjects. External relations came within this group. "The Government of India has, of course, made it a practice to consult all the provinces before undertaking such commitments. But it has neither disguished the fact that it must retain freedom to override their objections, nor admitted its obligation to consult them in all cases. The principle has here been established that the responsibility of the Centre for Central subjects prevails over the restrictions which have been placed upon its powers of control over provincial transferred subjects.[57]

The form in which the Government of India couched its communication to the Provincial Governments was one of advice but the Provincial Governments knew that though they might fully represent their views, ultimately they would have to bow down to the wishes of the Central Government. "The tradition of obedience", wrote the Simon Commission "extends also to the administration of transferred subjects."[58]

Maintenance of law and order also gave wide powers to the Home Deparment of the Central Government to control the provincial affairs. Then again the powers of superintendence, direction and control vested in the Secretary of State for India were as far reaching as those vested in the Governor-General-in-Council. The Governor-General-in Council could exercise this power in order to safeguard the administration of Central subjects. This was a wide power indeed. In addition to this the Secretary of State could exercise this power to safeguard the imperial interests. Anything and every thing might come under these two sweeping powers and all original division of powers as provided by the Act might be destroyed by the exercise of them. The Devolution Rules specified the cases of control from above but the Finance Department was the medium through which the Central control extended all over the provincial sphere.

Various obvious defects causd the failure of the Montagu-Chelmsford Reform i.e. that portion of it which was connected with

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[57] Report of the Indian Statutory Commission 1930, para 255.
[58] Report of the Indian Statutory Commission, para 256.

provincial government. First of all, the whole system of administration is a compact whole and to divide it into watertight compartments is next to impossible. The Act of 1919 attempted to provide for this type of impossible division but it was in theory only that they were successful. This was because the division was unscientific and illogical e.g. education was a transferred subject but European and Anglo-Indian education was a reservd one. It seems that the Indian Ministers could not be trusted to deal fairly with these communities. In this particular subject, the motive behind the illogical division is explicable but in some other cases the division was both illogical and the reason for it was inexplicable.

Thus agriculture was a transferred subject but irrigation was a reserved one. Development of Industries was a transferred subject but forest was a reserved one. This sort of unscientific division brought about many confusions and was a serious shortcoming of the Act. K. V. Reddi, the first Minister of Industries in the Madras Government stated this limitation in the following words:—

"I was a Minister for development without forests. I was a Minister of Agriculture minus irrigation. As Minister of Agriculture, I had nothing to do with the administration of the Madras Agriculturists Loans Act or the Madras Land Improvement Loans Act. The efficacy and efficiency of a Minister of Agriculture without having anything to do with irrigation, agricultural loans, land improvement loans and famine relief, may better be imagined than described. Then again, I was Minister for industries without factories, boilers, electricity and water power, mines or labour, all of which are reserved subjects."[59]

Thus Sir Surendranath Banerjea said, "It may often set up two divergent and even conflicting interests (the reserved and transferred) which must interfere with that homogeneity and solidarity which is the truest guarantee of efficiency and which in the long run secures public approbation."[60]

The Governor developed the practice of consulting ministers but ignoring their advice whenever there was difference of opinion.

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[59] Kerala Putra : The Working of Dyarchy in India, p. 43.
[60] Banerjea Sir Surendranath : A Nation in Making, p. 386.

This was against the provision of the Act which laid down that he should be guided by that advice and only in cases of fundamental difference disregard it. [Sec. 52 (3)]. When the Reform Enquiry Committee, under the chairmanship of Sir Alexander Muddiman was appointed by Mr. Ramsay Macdonald, Mr. Chintamani who was the first Minister of Education in the United Provinces, stated in his Memorandum to the Committee that he was even over-ruled in the matter of nomination to a library committee. The Governor had the power of dissolving his legislative council and choosing new ministers after a fresh election. In cases of emergency he possessed the power of not filling ministerial vacancies and of resuming himself the administration of transferred subjects. True this was a temporary affair but even during that short period the ministers felt that the interference of the governors was hampering their work in all matters great and small. In ordinary times also when all the Ministers were in office, the Governor was a connecting link between the two halves of the Provincial Government and as such he was expected to be impartial and to act as an umpire in any conflict of interest between the two halves. But in real practice, the governor never showed that even-handed justice which was expected from him. On the contrary there was a marked partiality towards the reserved half.

No provision was made by the Montford Reforms for Joint or Cabinet meetings of ministers. The Instrument of Instruction issued to the governors did not require the governor of a province to consult the ministers together or to convene cabinet meetings of ministers. The ministers were to be appointed separately by the governor and were to be responsible individually to the legislature. "The ministers had to be chosen from a variety of political and communal groups, and it early appeared that collective responsibility would be impossible to secure. Ministers could not be and were not, chosen because they had a common policy but because they were leading men of groups strong enough to insist on representation in the ministry."[61]

It was the governor who was to decide whether he would consult the ministers together or separately. It was left to the ministers to establish the practice of acting in concert by resigning

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[61] Keith, A. B.: *Op. cit.*, p. 277.

in a body when one of them had been forced to resign. The Instrument of Instruction provided that the governor should act as a guide to his ministers and advise them in regard to their relations with the Legislative Council and to support them generally as far as possible. He was to keep them in office so long as he was not convinced that they had lost the confidence of the council. So the ministers were turned into puppets in the hands of the British overlords. There was another reason behind this humiliating position of the ministers. The healthy development of party system, which is one of the essential conditions of the introduction of responsible government, was lacking in most parts of India at this time. It was only in Madras that we find the growth of it for "the non-Brahmin Hindus united in the Justice Party to challenge the old established supremacy of the Brahmin oligarchy."[62]

Elsewhere even such caste-based parties were lacking. The result was that ministers were not supported by majorities pledged to back them as party leaders. So ministers could remain in office with the help of the official block. This need of winning the support of official block was destructive of true responsibility. "A ministry which was on good terms with the official block of the government possessed a sound basis of support which rendered it possible to hold office although the parties represented by ministers were weaker than their opponents."[63]

Officials and nominated members amounted to 30 p.c. of the total number and they created a block which could maintain the ministers in office, even if they commanded the votes of a minority of the elected members. Again the 70 p.c. of the elected members did not form a block. A considerable section of them came from special constituencies like European Chambers of Commerce and landholders, whose votes were always at the disposal of the government. So the ministers clung to the governor for support of the nominated and official members in the legislature and sank down to the position of glorified secretaries.

Then again no attempt was made to provide training of responsibility to the ministers. In Madras "the Governor (Lord Willingdon) decided to ignore the provisions of the Act and to treat his executive Council and Ministers collectively as a unitary

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62 Coupland : The Constitutional Problem in India Part I, p. 71.
63 Keith A. B.: *Op. cit.*, p. 278.

cabinet. So did Lord Lytton in Bengal and to a less thorough-going extent the same policy was adopted by Sir Harcourt Butler during the first two years of the life of the first Council in the United Provinces.....It did not in fact provide the training in ministerial responsibility which had been the main object of the Act of 1919 since it necessarity blurred the distinction between Ministers who were responsible to the Council and Executive Councillors who were not."[64]

The relation between the ministers and the permanent secretaries was also defective. Though theoretically the ministers were their masters, the secretaries could make direct appeal to the governors against the ministers. "The rule under which the permanent heads of department were required to bring to the notice of the governor matters of importance affecting his responsibilities and had direct access to him, unquestionably secured efficiency in large measure but it did obscure the responsibility of ministers."[65]

In actual practice the control or influence of the Secretary of State extended through the Public Services and the Finance Department to the whole transferred sphere.

The members of the All India Services, who actually ran the transferred Departments, were not under the control of ministers. They had direct access to the governors and their interests were protected by the Secretary of State.

The Ministers had no power of appointment. Nor could they dismiss even the superfluous members of their Departments. The ministers had no direct or indirect control over the reserve wing whereas the reserve wing had indirect control over the ministers e.g. Finance, Law and Order were reserve subjects which could not but have indirect influence over the transferred wing. Then again finance members always saw to it that the reserve half got sufficient money but they did not care to make provision for the transferred half. Naturally the latter had to carry on their work with difficulty.

The abominable feature of the communal electorate was not abolished but had become an established fact now. "To our

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64 Coupland : The Constitutional-Problem in India Part I p. 69.
65 Keith A. B.: *Op. cit.*, p. 278.

minds," wrote the Joint authors of the Montagu-Chelmsford Report, "so long as the two communities entertain anything like their present views as to the separateness of their interests, we are bound to regard religious hostilities as still a very serious possibility. The Hindus and Mohammadans of India have certainly not yet achieved unity of purpose or community of interest."[66]

They knew that the history of self-government refuses any rival claim to a peoples' alleginance. Yet communal representation was retained. Coupland says that the feeling of separateness that existed between the two communites, "compelled Montagu and Chelmsford to acquiesce like Morely and Minto before them, in the retention of separate electorate."[67]

In view of later findings, we cannot agree with the view that the introduction of communal electorate was a reluctant grant at least on the part of Lord Minto. But about Montagu-Chelmsford, we agree with Coupland that they were compelled by two things. One was previous introduction of it in the Act of 1909 and the second and more important was the acceptance of it in the Congress League Scheme. Any-how it came to stay and from this point of view there was no improvement in 1919 upon the provisions of 1909. Thus the legislative councils were divided into communal compartments and this made sectionalism contagious. Lack of joint responsibility of the ministers brought about lack of solidarity and co-operation among them. The ministers were regarded both inside and outside the legislatures as government men and not the representatives of the popular forces.

The announcement of August 20, was too "cautious and carefully worded".[68] The goal was set forth as the progressive realisation of responsible Government of India but the term "progressive" was rather vague. It did not mention any particular date at which the ideal would be realised thus ignoring the Congress claim which was represented by Mrs. Annie Besant who demanded "A Bill during 1918 establishing self-government in India on lines resembling those of the Commonwealth on a date to be laid down therein, preferably 1923, the latest 1928, the intermediate five or ten years being occupied with the transference of the Government

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66 Report on Indian Constitutional Reforms 1918, para 154.
67 Coupland, R. The Constitutional Problem in India, p. 58 (part II).
68 Punniah : Constitutional History of India, p. 307.

from British to Indian hands maintaining the British ties as in the Dominions".[69] But this suggestion was not accepted and no time limit was specified within which this realisation might be expected. Thus it was a political stunt.

Then the announcment made it clear that the British Government must be judges of the time and measure of each advance. This went clean against the principle of self-determination. Inspite of its lukewarm appreciation of the Reforms as "inadequate, unsatisfactory and disappointing", the Indian National Congress at its annual session of 1919 decided to work the Reforms. Yet the scheme failed. The root cause of it was that Dyarchy was based on a distrust in the capacity of the people to govern themselves and this attitude of the British brought about the disapproval of the general public, which was one of the causes of its failure. Thus Sir Surendra Nath Banerjea said, "so far as one can judge, educated public opinion condemns it ; and no popular institution can in these days thrive without the support of public opinion."[70]

Thus a close scrutiny of the Reforms of 1919 discloses the niggardly policy followed by the British in granting incomplete and imperfect government to the Indians and that also by instalments and also in driving a wedge into the solid rank of Indian nationalists by the introduction of the poisonous element of communal electorate. Later constitutional history shows the evil effect of both these principles, and we are going to trace its course in the next chapter.

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[69] Extract from Presidential address of Mrs. Besant in the Calcutta session of the Congress in 1917.

[70] Banerjea Sir Surendranath : *Op. cit.*, p. 386.

CHAPTER IV | PRELUDE TO THE GOVERNMENT OF INDIA ACT, 1935

Various causes contributed to the failure of the system introduced in 1919. One of them was the protest of the Congress. On Augusst 29, 1918 Congress met under the presidentship of Mr. Hasan Imam to discuss about the declaration of the Secretary of State on August 20, 1917. After four day's discussion, the Congress declared that nothing less than self-government within the Empire would satisfy the Indian people. It criticised the proposal of the Montagu-Chelmsford scheme which was for introducing responsible government in the provinces only and that also partially. It declared that the people of India were fit for full responsible government. In fact this was nothing but an echo of an earlier claim voiced by Mr. Gokhale. As early as 1905 he announced, "The goal of the Congress is that India should be governed in the interest of Indians themselves and that in course of time a form of government should be obtained in the country similar to what exists, in the self-governing colonies of the British Empire."[1]

In the succeeding sessions of the Congress, we find the same demand repeated again and again. In 1906 the Congress passed a Resolution as follows :

"This Congress is of opinion that the system of Government obtained in the self-governing British colonies should be extended to India."[2]

In 1919 at the Amritsar Congress Indian politicians were divided in their opinion on the question of co-operation with the Reforms. Pandit Madan Mohan Malviya and Gandhiji were for working the Reforms while C.R. Das was for rejecting the scheme. Among the main Resolutions of the day, we find an assertion that India at that time was fit for full responsible

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[1] Presidential address at the Congress Session of 1905.
[2] Congress Resolution of 1906 No. IX.

government. Soon after this as a protest against the injustice to the Khilaphats and certain atrocities of the British authorities in the Punjab, the Civil Disobedience movement was started under the leadership of Gandhiji. But the Civil Disobedience Committee allowed the non-cooperators to contest the elections. Then a group of liberals among the Congressmen known as the Swaraj Party contested the elections to the various Legislative bodies and secured a series of victory both at the Centre and at the provinces. The Swarajists proclaimed,

"Our position is really not so much that of obstruction in the Parliamentary sense as that of resistance to the obstruction placed in our path to Swaraj by the bureaucratic government."[3]

They decided to throw out the budgets because by the provisions of the Act, the people had no real voice in the framing of the Budget nor did they have any control over those who framed it. They also decided to throw out proposals for legislation because these, according to them, were the means of strengthening the hands of the bureaucratic government.

Soon after entering the Assembly, the Swaraj Party moved a Resolution as follows :

"This Assembly recommends to the Governor-General-in Council to take steps to have the Government of India Act revised with a view to establish full Responsible Government in India and for the said purpose to summon at an early date a representative Round Table Conference to recommend, with due regard to the protection of the rights and interests of important minorities, a scheme of Constitution for India".[4]

On 26th November, 1927 a Royal Commission with Sir John Simon in the chair, was appointed to inquire into the working of the system of government and the development of representative institutions in India. There was a storm of protest against it which raged throughout the country because the Commission had not a single Indian member in it and was boycotted by the Congress.

Anyhow the Simon Commission finished their enquiry and submitted their recommendation which provided for a future All

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[3] Sitaramayya Pattabhi : The History of the Indian National Congress, Vol. I, p. 272.

[4] *Ibid.*, p. 286.

India Federation. That is to say, they saw no chance of its formation in the near future. The complete denial of central responsibility and the provision for an irresponsible and autocratic Central Executive, made its recommendations unacceptable to the people of India.

In 1929 Lord Irwin went to England to discuss the situation and on his return to India made the following statement :

"In view of the doubts which have been expressed both in Great Britain and in India regarding the interpretation to be placed on the intention of the British Government in enacting the statute of 1919, I am authorised on behalf of His Majesty's Government to state clearly that in their judgement it is implicit in the Declaration of 1917 that the natural issue of India's constitutional progress as therein contemplated is the attainment of Dominion Status".[5]

Lord Irwin further announced that it was His Majesty's intention to invite the representatives both of British India and Indian India to discuss problems relating to constitutional reforms in India. On behalf of the Congress a previous assurance was asked for from His Majesty's Government that the purpose of the conference would be to draft a scheme of Dominion Status for India and that His Majesty's Government would be prepared to support it. His Excellency made it plain that, "the conference was designed to elicit the greatest possible measure of agreement for the final proposals which it would be the duty of His Majesty's Government to submit to Parliament and that it was impossible for him or His Majesty's Government in any way to prejudge the action of the Conference or to restraint the liberty of Parliament".[6]

Then at the annual session of the Congress held at Lahore, the Viceroy's announcement was discussed and it was decided that nothing would be gained by Congress participation at the session of the Conference. It was now felt that the British authorities could not give any assurance about drafting a scheme for Dominion Status. As such in order to achieve it, the Congressmen should

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5 Announcement of Lord Irwin, 31st October, 1929.

6 Official statement of the discussion between Lord Irwin and the Indian leaders on 23rd December, 1929.

completely boycott the Central and Provincial legislatures and committees constituted by the Government. This was the beginning of non-cooperation and as a corollary to it, the Civil Disobedience Movement was soon started.

While things were going on like this in India, the Round Table Conference was inaugurated by His Majesty, the King Emperor on the 12th November, 1930. The most striking feature of the opening debate was the declaration by the States' delegates for opening the way to the consideration of a new federal Constitution for India.

This brings us to an interesting problem. We remember that the Simon Commission did not find any immediate possibility of federation in India. But the Round Table Conference which met soon after opened the way for the formation of the federation. What was responsible for this quick change of decision on the part of the British ? In order to understand it, we have to examine the political atmosphere which prevailed in India at that time.

"It is necessary", said the Simon Commission," to take a long view of the development of Indian self-government..... A premature endeavour to introduce forms of responsible govern-at the centre before the conditions for its actual practice have emerged would in the end result not in advance but in retro-gression".[7]

So the introduction of responsible government at the centre was to await development in the Provinces and naturally the final federation would be a distant goal. In a long Dispatch published soon after, Lord Irwin and his colleagues stated their opinions on the proposal. The ultimate federal objective was not questioned. But it was said that "a federation of All India is still a distant goal".[8]

But the Simon Commission was not against the principle of federation. Rather they said,

"The ultimate constitution of India must be federal, for it is only in a federal constitution that units differing so widely in

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[7] Report of the Simon Commission, Vol. II, part IV, para 177.
[8] Government of India's Dispatch, September 20, 1930.

constitution as the provinees and the states can be brought together while retaining internal autonomy".[9]

They also said, "It is only in a federal structure that sufficient elasticity can be obtained for the union of elements of diverse internal constitution and of communities at very different stages of development and culture".[10]

But they rightly thought that "while we hold that the ultimate development of Indian polity must lie in the direction of a solution embracing all India, it is absolutely clear that the States cannot be compelled to come into any closer relationship with British India than exists at the present time."[11]

So the main difficulty in the immediate solution of the federal problem was thought to be the States. There was, however, a slow but sure change taking place in the political atmosphere of the States themselves. In order to understand it, we have to probe deeper into the history of the States.

From the time of the acquisition of Diwani of Bengal by the Company in 1765 to the end of the rule of Warren Hastings, the Company was engaged in wars with Mysore and the Marathas. This period saw the development of subsidiary alliance. These alliances proved to be the means of reducing Indian powers to a position of subordination. The prince, with whom the alliance was made had to leave his relations, both of dispute with and of claims upon his neighbours to the arbitration of the English, to give up all connections with other foreign powers and to maintain within his territory a British Army officered by Europeans. This was a system of subsidiary alliance because it consisted of the maintenance of a British army within the territory of the native state for whose expenses a subsidy was given by the protected Ruler. As the alliance was made permanent and indissoluble, the Ruler was not in a position to retain his independence.

Then when by the Act of 1858 political power of the East India Company was transferred to the Crown, the relation with the states with all the treaties, sanads and engagements, passed in toto to the British Crown. It did not make any difference in the

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[9] Report of the Simon Commission, Vol. II, para 21.
[10] *Ibid.*, para 24.
[11] *Ibid.*, para 20.

legal theory of the relation. Then came a Renaissance in India in the form of the birth of Indian nationalism, which steadily grew apace and made its existence felt by the persistent demand for self-government.

On seeing the stirring of a new life and aspiration among the Indian people, the British authorities grew apprehensive of the danger to their Empire in India and tried to win over the Indian princes to their side, as a bulwork against the demand of the nationalists. The policy of the British authorities with regard to the states has been aptly summarised by the authors of the Montagu Chelmsford Report in the following words :—

"The policy of the British Government towards the States has changed from time to time passing from the original plan of non-intervention in all matters beyond its own ring-fence to the policy of subordinate isolation initiated by Lord Hastings ; which in its turn gave way before the existing conception of the relation between the States and the Government of India, which may be described as one of union and co-operation on their part with the paramount power".[12]

Of course, co-operation could not be on a footing of equality, because on the one side there was all along the idea of supremacy, with the privilege of controlling the external relations and interference in the internal affairs of the States, whenever it was necessitated in the interest of its imperialistic policy and on the other side the full consciousness of their precarious condition with almost absolute dependence for their existence upon the support of the other party. Any how it was due to the efforts of the British overlords who grew apprehensive of Indian nationalism and wanted to use the Princes as artificial props to support the structure of their imperialism, that the idea of establishing a common forum for the meeting of the Indian princes, was born. It was planned first by Lord Lytton but could not be put into practice. Then Lord Chelmsford initiated the practice of calling regular annual conference of the Princes to discuss affairs which were common to all the States or common to the States and British India. The Princes, however, were not satisfied with their position and presented their grievances to Mr. Montagu when he

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[12] The Report on the Indian Constitutional Reforms, 1918 para 297.

was touring India in connection with the Reforms. They wanted to have some voice in the determination of all India policy and also to have an impartial tribunal to decide disputed questions between themselves and British India.

The Montague-Chelmsford Report accepted the main proposals of the Princes and the Chamber of Princes was formally inaugurated in 1921. The Reforms of 1919, establishing partial responsibility in the provinces, threatened the personal autocracy of the Princes. They had the fear that the people of India might make common cause with the people in the States in destroying the personal rule of the Princes. Nor were their fears ungrounded. The Paramount Power with its policy of rallying the Princes to its support could not prevent hopes and fears from overlapping the boundary lines. Though the Congress had no party branch in the states, the people of the states organised themselves in the Indian States People Conference and began to put forth the demand for responsible government in the states. It declared its aim to be—

"The attainment of responsible government for the people in the Indian States through representative institutions".[13]

The Indian National Congress defined its attitude towards the Indian States at the Madras session in 1927 by urging upon the princes to introduce responsible government in the states. In the Resolution of the Calcutta session of 1928, there were two paragraphs which ran as follows :—

"The Congress urges (on) the Ruling Princes of Indian States to introduce Responsible Government based on representative institutions in the States and to issue immediately Proclamations to enact Laws guaranteeing elementary and fundamental rights of citizenship...."[14]

"The Congress further assured the people of the Indian States of its sympathy with and support in their legitimate and peaceful struggle for the attainment of full responsible government in the States.

This roused the Princes to a sense of their own danger. For "it was one thing for them to acquiesce in the authority of the

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[13] Quoted in Coupland R : Constitutional Problem in India Part I. p. 91.
[14] Congress Resolution of 1928.

Paramount Power so long as it was exercised by a Viceroy responsible only to the Secretary of State, but quite another thing if it were to be exercised on the advice of Indian Ministers ; Congressmen it might be, responsible only to the Indian Parliament".[15]

So they now claimed that from the beginning they had a direct relation with the British Crown and only indirectly with the Government of India so far as it represented the British Crown. When the relation between the Company and the States was transferred in toto to the British Crown in 1858, there was no voice of protest raised against it by the Princes. This was because the Princes expected no such crucial change in their condition by such a transfer as they later apprehended by a probable transfer to the British Indian Government. But after this the Princes had acquired political maturity and became collectively conscious about their political and constitutional interest. They knew that in a probable transfer of power to Indian hands, there were three possibilities for the States, First they might continue their existing relation with the Crown. In that case there would be a transfer of relation between the Crown and British India alone to a national Government responsible to the British Indian legislature. This idea was rejected because of its practical difficulty. The States could not sever all connections with British India as there was no geographical barrier between the two Indias and the development of communication brought them into close contact with each other. Then there was community of interest in various matters like defence, foreign affairs, fiscal policy, tariff regulation etc which needed a single governmental organization controlling the whole. The second possiblity was that the relation of the Crown with the whole of India should be transferred to a national government responsible to a British Indian legislature. This possibility was held in great contempt by the Princes as it would reduce them to a position of virtual dependence on the British Indians. To transfer defence and foreign affairs to an Indian national government would affect the Indian States adversely. This was not a desirable prespect for them. The third possibility was that the States should come within a common system of government with the British Indians and this could

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[15] Coupland R : *Op. cit.* Part I, p. 91.

only by effected by the formation of a federation. This was recognized by the authors of the Montagu Chelmsford Report when they wrote :—

"Granted the announcement of August 20, we cannot at the present time envisage its complete fulfilment in any form other than that of a congeries of self-governing Indian provinces associated for certain purposes under a responsible government of India ; with possibly what are Native States of India finally embodied in the same whole."[16]

In January 1926 the Chamber of Princes discussed the question of future reforms in India and their probable effect on the Indian States. The Viceroy held a Conference of political officers at Simla in July and according to the decision arrived at in the Conference, Lord Birkenhead, the then Secretary of State appointed on 16th December, 1927 a Commission of Enquiry known as the Indian States Committee with Sir Harcourt Butler in the chair. The Committee carried on its work from 1928 to 1929.

The Committee made the following statement in its report :—

"The 'Paramount Power' means the Crown acting through the Secretary of State for India and the Governor-General-in-Council who are responsible to the Parliament of Great Britain."[17]

They further remarked that the treaties into which the States entered with the British were treaties with the Crown and these treaties were of a continuing and binding force. The Report continued :—

"The relationship of the Paramount power with the States is not merely a contractual relationship, resting on treaties made more than a century ago. It is a living, growing relationship shaped by circumstances and policy, resting,....on a mixture of history, theory and modern fact."[18]

In a later portion of their Report, the Butler Committee admitted their inability to define Paramountcy. As an explanation of it, they wrote :—

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16 Montagu-Chelmsford Report, para 120.
17 Report of the Indian States Committee (1928-29) para 18.
18 *Ibid.*, para 39.

"Conditions alter rapidly in a changing world. Imperial necessity and new conditions may at any time raise unexpected situations. Paramountcy must remain paramount ; it must fulfil its obligations defining or adapting itself according to the shifting necessities of the time and the progressive development of the States.... On paramountcy and paramountcy alone can the States rely for their preservation through the generations that are to come. Through paramountcy is pushed aside the danger of destruction or annexation."[19]

The Committee then referred to the demand of the States that "without their own agreement the rights and obligations of the Paramount Power should not be assigned to persons who are not under its control, for instance an Indian Government in British India responsible to an Indian Legislature."[20]

"We feel bound", the Report continued, "to draw attention to the really grave apprehension of the Princes on this score and to record our strong opinion that, in view of the historical nature of the relationship between the Paramount Power and the Princes, the latter should not be transferred without their own agreement to a relationship with a new Government in British India responsible to an Indian Legislature."[21]

So the Butler Committee left it open to the States not to come to any closer union with British India if their special claims were not recognised. But the interest of the two Indias intertwined in the sphere of customs, revenue, post and telegraph, railway, defence and foreign relations. The Princes were fully conscious of it.

As early as December 1929, the Maharaja of Bikaner said, "I look forward to the day when a United India will be enjoying Dominion Status under the aegis of the King Emperor and the Princes and States will be in the fullest enjoyment of what is their due as a solid federal body in a position of absolute equality with the federal provinces of British India."[22]

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[19] *Ibid.*, para 57.
[20] *Ibid.*, para 58.
[21] *Ibid.*, para 58.
[22] Speech of H. H. Maharaja of Bikaner in the Legislative Assembly of his State, 19th December, 1929.

When the Dispatch of the Government of India was published in September 1930, they were more anxious to safeguard their position. The Dispatch read as follows :

"We require a vigorous Central authority capable of sustaining the heavy burdens that necessarily fall upon it. It will be responsible for the defence of the country against external attack and for the maintenance of the ultimate conditions of internal tranquility ; for the finances of India as a whole and its credit in the markets of the world ; for its commercial and tariff policy ; and for all these matters of common concern which must be handled by a Central Government."[23]

So the Princes thought that if they joined with British India in a federation with some reservation of powers that might save their position. There was increasing pressure from the people of the States also who declared themselves in unequivocal terms to be in favour of federation.

In the meantime the British Government was being impelled towards responsible Government in the Provinces. It could not safely concede it if the Central Government remained autocratic, since the result would be a constant attack upon the Centre by the Provinces which would remain assured of their position as exponents of the will of the people. It must therefore build up a central authority which would be partially responsible and at the same time conservative. The States could serve that purpose and achieve their own ends, for the British Government would be ready to satisfy them. This was why the British wanted the States to be a party in the future constitutional set up in India and invited the States to participate in the Round Table Conference. The Simon Commission had made recommendation for British India alone. "But," as Guy Wint points out, "shortly after it had submitted its report the task was rendered more complex, as it also became more momentous by the proposal of the princes-made of their own free will-to join with British India in the formation of a single and modern State."[24]

Guy Wint mentions certain reasons for the decision of the Princes. According to him sone of the wiser Dewans read the signs of the time and perceived that sooner or later a United

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23 Government of India Dispatch, September 20, 1930.
24 Schuster George and Wint Guy : India and Democracy, p. 138.

India was certain. So they advised their masters to enter the federation while they might still obtain favourable conditions for accession.

Wint also writes, "The Simon report had taken the view that responsible government at the Centre was not an immediate possibility in British India. It was the decision of the princes which transformed the situation."[25]

The idea of federation was shelved by the Simon Commission because they were not sure about the attitude of the States and it was the unexpected declaration of the States in favour of federation which opened the way for it. On 17th November 1930 in the meeting of the Second Plenary Session of the Round Table Conference, Sir Tej Bahadur Sapru invited the States to join in the federation and H. H. the Maharaja of Bikaner said,

"Speaking broadly the Princes and States realise that an All-India Federation is likely to prove the only satisfactory solution of India's problem."[26]

The Nawab of Bhopal also stated on behalf of the rulers that they were ready to join the federation provided their internal sovereignty was guaranteed. On behalf of the Muslim League, Sir Muhammad Shafi and Mr. Jinnah welcomed the proposal. Mr. Jinnah said on the 20th November, 1930,

"So far as we are concerned, the Simon Commission Report is dead. The Government of India Dispatch is already a back number and there has arisen a new star in our midst to-day and that is the Indian Princes."[27]

As V. P. Menon points out, the Civil Disobedience Campaign which was raging in the Provinces proved to be an eye-opener to the rulers of the Indian States. They knew what would happen if the campaign was extended to the States. As for the Muslim League, they had always opposed a strong centre and they welcomed the move by the States because that would envisage a weak centre. On the British side the Labour Government which had always professed sympathy with the Indian aspirations, could not

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[25] *Ibid.*, p. 139.

[26] Proceedings of the First Round Table Conference, Second Plenary Session, 17th November, 1930.

[27] Proceedings of the First Round Table Conference, 20th November, 1930.

turn down the unanimous recommendations of an Indian opinion specially as the Civil Disobedience Movement was going on in full force in India.

The first session of the Indian Round Table Conference was held from 12th November 1930 to 19th January 1931. There were various sub-committees formed during this session. Of them the first dealt with Federal structure. Sir Muhammad Shafi made it clear that so far as he was concerned, he could not consent finally to frame any constitution unless the Hindu-Muslim question was settled. Mr. Jinnah gave his adherence to this view by saying that no constitution could work in India unless it gave security to the Muslim and other minorities.

With regard to distribution of seats in the Upper Chamber controversy arose between members of the sub-committee. The States' representatives in the sub-committee pressed strongly for equality of seats between the States and British India. The British Indian representatives claimed on the ground of area and population, greater number of seats for British India.

"But though opinions differ as to the precise degree of 'weightage' to be conceded to the States, the sub-committee are unanimous that some 'weightage' must be given and that a distribution of seats as between the States and British India on a strict population ratio is neither defensible in theory nor desirable in practice."[28]

Thus from the beginning we find a conciliatory attitude on the part of the members of the Round Table Conference. About the Lower Chamber also the same type of controversy arose. The States claimed weightage and the British Indian representatives wanted distribution of seats on strictly population basis and the minority requested the majority of their colleagues to subordinate theory to expediency in the interest of goodwill.

The policy of His Majesty's Government was defined by Ramsay Macdonald at the end of the first session in the following words :—

"The view of His Majesty's Government is that responsibility for the Government of India should be placed upon Legislatures,

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[28] Proceedings of the First Round Table Conference, Second Report of the Federal Structure Committee para 28.

Central and Provincial, with such provisions as may be necessary to guarantee, during a period of transition, the observance of certain obligations and to meet other special circumstances and also with such guarantees as are required by minorities to protect their political liberties and rights.

"His Majesty's Government have taken note of the fact that deliberations of the Conference have proceeded on the basis, accepted by all parties that the Central Government should be a federation of all India, embracing both the Indian States and British India in a bicameral legislature. With a Legislature constituted on a federal basis, His Majesty's Governnent will be prepared to recognise the principle of responsibility of the Executive to the Legislature."[29]

After the first session of the Round Table Conference was over, meetings were arranged between the Viceroy and Gandhiji and the result was the settlement known as the Gandhi Irwin Pact which was signed on 5th March, 1931. The Government agreed to release all Civil Disobedience prisoners ; and the Congress agreed to suspend Civil Disobedience and to participate in the second session of the Round Table Conference.

"This session of the Round Table Conference"' as V. P. Menon says, "lacked the enthusiasm which had marked the first. The representatives of the Muslims and other minorities were clamorous for a settlement of their claims before any business could be done. Gandhiji directed his attention to finding a solution of this problem but after protracted negotiations he had to admit 'with deep sorrow and deeper humiliation' utter failure to secure an agreed solution of the communal problem. As for the rulers, the communal disharmony in British India gave them quite sufficient excuse to sit back and to watch developments."[30]

The acuteness of communal problem and apprehension of the minorities about the probable misuse of power by a majority government which hampered the progress of the Second Round Table Conference continued even after the return of the delegates from London. In response to the Muslim demand for an early settlement of the problem of communal representation,

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[29] Ramsay Macdonald at the first session of the Round Table Conference.
[30] Menon V. P.: The Transfer of Power in India, p. 47.

the Prime Minister announced the Communal Award on 16th April, 1932. The main feature of the Award was that election to the seats allocated to Muhammedans, Sikhs and European constituencies would be by communal electorate.

The third session of the Round Table Conference, which was held in November 1932, showed a definite set back in the enthusiasm of the Rulers as no important ruler was present in this session. During this session the work accomplished during the other two sessions was supplemented.

The decision which was taken by the Government in the light of the three Round Table Conferences was published in a White Paper in March 1933. In the next month, a joint committee of both Houses of Parliament was appointed with Lord Linlithgow in the chair. Its object was to consider the future government of India. A Bill based on the recommedations of the Joint Select Committee, was introduced in the House of Commons on 12th December, 1934 and debated in both Houses of Parliament. In both the Houses it was vehemently opposed by a section of the conservatives. But in the teeth of all these oppositions, the Bill was passed in both Houses and became the Government of India Act 1935.

CHAPTER V | THE GOVERNMENT OF INDIA ACT, 1935

The Act of 1935 did not inaugurate the Federation. It laid down the methods and procedure by which the Federation could be inaugurated. Part II of the Act was devoted to prescribing the structure of the Federation. There was no constitutional difficulty about the incorporation of the British Indian Provinces to the Federation because their political status and administrative machinary could be prescribed by the British Parliament. They could no longer remain in a position of dependence and subordination to the Central Government. All powers in relation to the Centre and the Provinces were to be resumed by the Crown and to be redistributed in such a way as to reduce them to a position of equality with each other. But in the case of the States, the Crown could not resume such power. If the Princes joined, they would join of their own accord. The new Constitution could not begin to work unless a substantial portion of the State's population and area were brought within it. Yet the Bill was passed into the Government of India Act in the hope that gradually some of the Princes, one at a time, would be persuaded to go and sign their names in the roll.

By the Act of 1935 three lists of subjects were drawn, one for the federal centre, the second for the Units and a third for the concurrent jurisdiction of both. With regard to the residue, it was laid down that if a subject was not included in any one of the three lists, the Governor General might empower either the Federal or the Provincial legislature to enact a law with regard to it.

The provision of the concurrent list definitely increased chances of litigation, for subjects enumerated in that list might come into conflict with subjects enumerated in either of the two other lists. The ideal position would be to have one list for one authority and to leave every thing else to the other authority but practical necessity demanded this position. When previously autonomous provinces federate, they may not be ready to hand

over all powers immediately to the federal Centre. In India before 1935 there was no autonomous provinces but the States were there. On the other hand, the newly constituted federal government might not be able to organise a system of uniform legislation or efficient administration to cover these fields. So it was thought better to include some of the subjects in a separate concurrent list. Moreover, as was pointed out in the Report of the Joint Select Committee, the majority in India who were Hindus, wanted a strong Federal Centre while the Muslim minorities wanted the Provinces to retain more powers in their hands. So this concurrent list was a working compromise between the two demands.

What is interesting in this case is the provision for deciding any conflict of jurisdiction between the two authorities with regard to a subject enumerated in the concurrent list. In general, in case of repugnancy, the law passed by the Federal Centre was to prevail over a Provincial law but it was possible for a Provincial law to prevail over a Federal law if the Governor-General consented. This gave flexibility in the exercise of the concurrent jurisdiction and at the same time allowed the Governor-General to retain a potential control in his hands which went against the strict federal principle.

The second main feature of the Act was that it shifted dyarchy from the Provinces to the Centre. In other words it was provided that the Provinces were to have full autonomy or full responsible government and the Centre was to have partial responsibility. Defence, ecclesiastical affairs and external affairs were to comprise the reserve group which were to be administered by the Governor-General with the advice of a new type of officials called Counsellors. The other subjects were to be administered by him with the aid and advice of a Council of Ministers, who were to be members of the Federal Legislature and responsible to it.

The Governor-General was to have many types of powers in the executive, legislative and financial sphere and three different ways were prescribed for the exercise of his powers. Ninety four different sections of the Act made a mention of those cases in which the Governor-General was to act in his discretion. This meant that in such cases the Governor-General might take decision in his own responsibility withont consulting the Ministers though he was not elearly forbidden to consult them. Thirty five different

sections of the Act mentioned those cases in which the Governor-General was to exercise his individual judgment, that is, cases in which he was expected to take the advice of his ministers but was not necessarily to accept it or act accordingly. The subjects included items falling within his special Responsibilities. In the remaining cases only he was to seek the advice of the ministers and act according to their advice.

In case of the breakdown of the constitutional machinery, all the powers of the Federation could be taken over by the Governor-General acting in his discretion. In addition to this he could also pass the Governor-General's Act without any reference to the legislative bodies and he could also issue Ordinances either on the advice of his Ministers or in his discretion.

In both the Houses of the Federal legislature, the communal electorate was preserved. The official blocks were to disappear thus leading to the disappearance of bureaucratic control of voting in the legislature, which was in such a glaring opposition to the democratic principle but much of the good brought by such disappearance would be undone by the entry of the State's representatives, who would be nominees of the rulers, controlled by them and would form a substantial portion of the House. Forty percent of the membership was to be constituted by the State nominees. The privision for the presence of this nominated group was an anachronism in the modern democratic system but it was a concession which had to be granted in order to attract the princes into the federation.

The Provinces were made autonomous units independent of the Federal Government. In general this was the principle followed but with regard to the executive authority, it was prescribed in the Act that at times the Governor-General acting in his discretion might issue orders to the Governor of a Province as to the manner in which its executive authority was to be exercised to prevent a grave menace to the peace and tranquility of India or any part thereof. If at any time the Governor-General in his discretion declared that a grave emergency existed by which the security of India was threatened, the federal legislature could legislate for a province or any part of it. At such a time, the federal government also could issue directions prescri-

bing the manner in which the executive authority was to be exercised.

The powers conferred upon the Governor under the Government of India Act of 1935, like the powers of the Governor-General, could be divided into three categories. He could act in his discretion, he could act in his individual judgment and he could act on the advice of his Ministers, who were responsible to the legislature. So far as the Governor was empowered to act in his discretion, he was not required to consult his Ministers at all. To this extent Provincial autonomy was reduced for Provincial autonomy means both freedom from external control and responsibility to popular ministers. Where the Governor was to act in his individual judgment, he was expeceted to take the advice of his ministers but there was no constitutional restrictions on his ignoring such advice.

Before the Act of 1935, the power to promulgate Ordinance was confined to the Governor-General alone. But under the Act, the Governors became heads of federal units and as such they were given this power. The Governors could promulgate two types of Ordinances, one of them could be promulgated on the advice of Ministers and the other could be promulgated on their own authority, if at any time, they were satisfied that immediate action was necessary for those functions with regard to which they were to act in their discretion or in their individual judgment.

The power of certification was a new type of autocratic power given to the Governor-General and the Governors by the Montagu-Chelmsford Reforms. The act of 1935 retained it. It was laid down that if at any time the Governor thought it necessary to pass certain legislation for the discharge of his duties, which had to be performed in his discretion or in his individual judgment, he could either enact a Governor's Act consisting of such provisions as he thought necessary or he might send to the legislature the draft of a Bill which was to be considered in the legislature but must be passed in its original form. Like the Governor-General in the Federal sphere, the Governors in the Provinicial sphere were to have special responsibilities and when the Governor acted in his discretion or in his individual judgment, he was to be under the general control of the Governor-General. The functions which he could discharge either in his discretion or in his

individual judgment overspread the whole provincial sphere. Thus the beneficial effect of the abolition of dyarchy was reduced to the nill by the grant of autocratic power to the governor, which did not remain confined within any particular Reserved Department but was a canker eating into the whole provincial body politic.

Then again in case of grave emergency threatening a constitutional deadlock, the Governor might declare, by a Proclamation, that he would assume all or any of the powers exercisable by any provincial body and authority. Such a Proclamation must cease to operate after six months unless Parliament by resolutions allowed it to continue further. In any case it could not remain in operation for more than six months.

In the sphere of finance, the Provinces were given autonomy in respect of taxation, expenditure, audit and account and borrowing. The field of taxation was divided into four categories. First of all, there were those items on which the federal government had the sole authority to raise taxes. In this group were included customs, currency and coinage, income from federal railway, military receipts and import duties. Secondly, there were those items on which taxes were levied by the Federation but the proceeds of which were shared between the Federation and the Provinces. These included taxes on income other than agricultural income, certain excise duties, salt duties and export duties. Thirdly, there were items like succession to property other than agricultural land, stamp on bills of exchange, cheques, promissory notes, bills of lading, policy of insurance, terminal taxes on goods and passengers carried by railway. This group included those items on which taxes were levied by the Federation but the proceeds were completely handed over to the Provinces. This was made for the sake of uniformity. The fourth category included land revenue, irrigation, certain types of excise duties, succession to agricultural property, taxes on professions and calling, tax on land and building, sale and advertisment, amusement, luxury, stamp and registration. In this sphere the Provinces had independent power of taxation.

In the field of expenditure, they were unfettered by Central control and with regard to borrowing we find that the Provinces were given entire freedom. Under the Act of 1919 the Provinces could not raise any loan within India without the sanction of the

Government of India and for raising loan outside India, they had to obtain the sanction of the Secretary of State. Now they could raise loans on their own account. They could keep their account with the Reserve Bank of India and could make their own arrangement for audit and account.

The Act thus made a clear-cut separation (as far as possible) between the Federation and the Provinces. It was not possible to completely demarcate the sphere of taxation of the two authorities for in that case both would be handicapped. So it was provided that certain sources of revenue like income tax and jute export duty should be shared between the Federation and the Provinces. The Provinces ceased to make any contribution to the Centre. On the contrary the Centre paid cash subvention to provinces which needed help to balance their budget. This subvention was made on the basis of the investigation and recommendation of Sir Otto Niemeyer. He based his suggestions on two main ideas. First, that the financial stability and credit of India should be ensured. Secondly, the Provinces should be enabled to start their autonomous career without any hindrance and they would be able to balance their budget without any excessive reduction in their expenditure for in that case the efficiency of their administration might be compromised. In order to pave the way for it, Otto Neimeyer suggested the cancellation of all old debts to the Centre incurred by the Provinces before April 1, 1936. The "Award" of Otto Niemeyer was incorporated without any alteration in the Order in Council issued by the Government of India in 1936.

If we study the Indian situation of this time we find that there were three Indian parties which were interested in the Constitutional changes. They were the Princes, the Muslim League and the Congress. As such the failure of the Act was due to the disapproval of these parties. So let us discuss the attitude of the different parties towards the federation.

It was the consent of the Princes which had unexpectedly opened the way for federation and when the Government of India Bill was to become an Act, the question of the Princes' acceptance of the same assumed a great importance. A meeting of the Rulers and States ministers was held in Bombay in 1935 and the Government of India Bill was criticised threadbare. They discussed the old, controversial question of Paramountcy and some of the

comments of the Butler Committee. The Committee had reaffirmed the supremacy of the Crown and had said that the exercise of Paramountcy depended not only on treaties and agreements but on usages and sufferences. The Princes did not like the idea that these sehould be combined with the term "treaties" in the Instrument of Accession. They wanted that the Instrument of Accession should be called "Treaties of Accession". Apparently it seems only to be a change in the language but really speaking this proposal would mean a vital change in the relation between the Crown and the Princes. It would mean that the agreement of accession was a bilateral agreement. But the Secretary of State Sir Samuel Hoare replied that the Prince's claim to be treated as equal could not be accepted.[1] The Princes thought this to be an insult to their position. But this was not the only factor which made them averse to the Bill. They did not like some of the provisions included in it. One such provision was the Governor-General's special responsibility to prevent 'any grave menace to the peace or tranquility of India or any part thereof. They thought that this would be a threat to the sanctity of their sovereignty and internal autonomy.[2]

Marqess of Linlithgow, the Chairman of the Joint Select Committee became the Viceroy in 1936 and as the formation of the federation depended mainly on the acquiescence of the Princes, he decided to make a personal appeal to them by sending his own emissaries to their States. The three emissaries toured over the States from 1936 to 1937 with draft copies of the Instrument of Accession and in course of their tour discovered that the rulers were thinking of a less organic federation than was embodied in the Government of India Act 1935. They were anxious for their own safety within the federation. They wanted safeguard for two things, their sovereignty and their financial position. The report which the emissaries submitted early in 1937 pointed out that the Princes were in a bargaining mood. In May 1937 after having informal talks with the rulers, the Secretary of State came to the conclusion that on the whole the rulers were unwilling to enter the federation.

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[1] Views of Indian States on the Government of India Bill (1935) Cmd. 4843, 17.

[2] Views of Indian States on the Government of India Bill (1935) p. 20.

"The feeling among the general run of the States was one of more or less reluctant acceptance of the inevitable, whilst, among the 'diehard' minority opposition to the federation scheme..... was as strong as ever."[3]

The greatest difficulty was about the fiscal rights enjoyed by the States which were to be sacrificed by them if they joined the federation. Customs, sugar excise and match excise were subjects included in the Federal items of taxation under the Government of India Act of 1935 but States like Kathiawar, Kashmir and Mysore were deriving considerable revenue from these items. The rulers demanded from the emissaries the right to retain, these sources of revenue even after their entrance in the Federation. Lord Linlithgow had a very sympathetic attitude towards the States' rulers. He thought that immediate sacrifice of revenue was too great an obstacle in the path of the desire of the States to enter the Federation and if necessary, the Government of India Act was to be modified to allow the States to maintain the revenue. The Secretary of State thought that such an amendment would place the States in an unduly advantageous position and though some temporary arrangement could be made to satisfy the States, there could be no amendment of the Constitution. The Political Department tried to solve the problem of meeting the demands of the Rulers without altering the provisions of the Constitution. But the Rulers presented exorbitant demands. Mysore and Indore wanted to retain Corporation tax for an indefinite period, States having agreement on salt refused to surrender the right with regard to that subject. "There were some rulers who even suggested that the Federal Government should not directly exercise any administrative functions in their States, but that all such functions should devolve on State Governments or authorities as agents of the Government of India."[4]

In the meeting of the rulers and their Ministers in Bombay in 1938, the need for specific safeguards was demanded. In January 1939, the Viceroy sent a circular to the rulers with a revised draft of the Instrument of Accession and the latter were asked to inform about their decision with regard to entering the federation within six months. At a second meeting held at Bombay,

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[3] Menon V. P.: The Story of the Integration of the Indian States, p. 38.
[4] Menon V. P.: *Op. cit.*, p. 39.

the rulers and ministers decided that the terms offered in the revised draft were unsatisfactory and could not be accepted. At the same time they informed the Viceroy that they had the belief that the doors of the All India Federation would not be closed.

"After the Bombay Conference....the Dewan of a prominent State went to the political Adviser and told him that, if a guarantee could be given in respect of the customs rights of Baroda and the maritime States of Kathiawar, as well as Kashmir, there was every likelihood that those States would agree to join the federation. It was suggested that if they came in, others would follow suit.....Lord Linlithgow suggested to the Secretary of State that it was essential that some major States should be encouraged to give a definite lead in the matter....With Kashmir and Baroda and the maritime States of Kathiawar reassured on this particular issue, his firm opinion was that the tide would turn strongly in favour of federation."[5]

But the Secretary of State raised objection on practical grounds. He asked the Viceroy how the treaty rights of particular States could be guaranteed to the exclusion of all the other States. Then again he thought that this would be an injustice to the British Indian Provinces and would be considered by them as anti-federal. Thirdly, he thought that even if this privilege was granted to some of the States, political forces might come into play and do away with this unjust provision. Fourthly, there was no guarantee that even with this much concession, sufficient number of States would be attracted towards the federation. Because of the wavering attitude on the part of the States, nothing was decided about the Federation, when the Second World War broke out.

R. Coupland says that it was not only a closer understanding of the real implication of the federal union which prompted the retreat of the States. The Congress attitude towards the States was also responsible for it. Throughout the sessions of the Round Table Conference, the Congress had maintained the policy of non-interference in State affairs. Its sympathy with the demand of the States' People Conference was only in spirit and not in action.

In 1935 also the Congress Working Committee reaffirmed its decision of 1928, that the movement for full responsible Government

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[5] Menon V. P.: *Op. cit.*, p. 41.

in the States should be carried on by the people of the States themselves without expecting any support from outside. This policy which was adopted by Gandhiji and was prompted by a belief in the Princes' sense of patriotism and real desire to bring about gradual liberalisation of the States' did not last long. A young group of enthusiasts in the Congress wanted a revolutionary change in the policy of the Princes towards their own subjects. Then again, they did not like the concessions made to the States in the Constitutional scheme.

"The British Government was flatly charged with a deliberate attempt to use the Princes to bolster up the tottering structure of imperialism in India. The official policy of the Congress was still 'non interference' but when the Act of 1935 came into force in the Provinces in 1937 and Congress Ministers came into power, it rapidly gave place to a new 'activist' policy—a policy of undisguished hostility to the States governments and of open encouragement of agitation within and without the States against them.....They were sufficient in themselves to explain the hardening of the Princes' attitude towards the federal scheme."[6]

Of course, the Princes had other reasons for retreating from their agreement to accede to the federation but the attitude of the Congress was also partly responsible for it.

"It is belived", writes R. Coupland, "that at one time some of the more important States might have been induced to accept the federal scheme if they could have obtained more favourable terms with regard to their right to levy customs and excise duties than were consistent with the federal principle of fiscal union. But on them, as on the others, the new attitude of the Congress was bound to have a deterrant effect and to stiffen their hesitation into something like a definite rejection of the scheme."[7]

Coupland says later that the main motive of some of the Congressmen in this policy of interference was to deter the Princes from acceding to the Federation and killing the chance of the Federation coming into existence. If it was so, they were successful.

But we find that it was not only the Congress which stood against the unfair demand of the Princes. When the Joint Select

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[6] Coupland, R.: The Constitutional Problem in India Part II, p. 5.
[7] Coupland, R.: *Op. cit.* Part II, p. 6.

Committee Report was being debated in the Central Legislative Assembly in February 1935, Mr. Jinnah brought three resolutions, one of which condemned the special privileges granted to the Princes in the proposed Act.

"The federal plan," he declared, "is completely vitiated by the 'impossible terms which the Princes have laid down'. 'I believe that it means nothing but the absolute sacrifice of all that British India has stood for and developed in the last fifty years in the method of progress in the representative form of government."[8] This resolution was carried by the combined Congress and Muslim League votes. So it shows that the Muslim League was as articulate as the Congress in its protest against the special favour granted to the Princes.

Now, if we study later developments, we find that after independence, the Princes could neither save the States from disintegration, nor could they withhold the onrush of democratic ideas in the States leading to the liberalisation of the system of government. Moreover they lost their position of supremacy. If they were wise enough they could have accepted the Federation for what it was worth and could have promised to introduce democracy in their States. In that case they would have obtained more sympathy from their own people who might elect the rulers themselves as their representatives. It is true that liberal government in place of autocracy would mean that the rulers would have to be governed by the wishes of their ministries but if the rulers voluntarily introduced democracy in their States, the possibility of a hostile ministry in their own States would have been reduced. They themselves lost the chance of earning the goodwill of their people inside and outside their States by their adherence to the moth-bitten treaty rights guaranteed by a Paramount Power, which was itself losing its hold on India.

But though the Princes had the major share of responsibility for the failure of the federation, they alone were not responsible for it. The Muslim League and the Congress also had their shares.

The Muslim League had agreed to participate in the Round Table Conference in a mood of compromise and as in the

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[8] Resolution of Mr. Jinnah in the Central Legislative Assembly in February, 1935.

Conference so in the Committee they insisted on the fulfilment of their demands. Dr. Shafa' at Ahmed Khan speaking for the Moslems of the United Provinces, said that they had never opposed any advance either in the Centre or in the Provinces. But in exchange of it, they wanted that their rights and interests should be safeguarded.

In the second session of the Conference again, it was the Communal question, which was mostly worrying the delegates. When Gandhiji declared the utter failure to reach an agreed solution of the communal problem, the representatives of the leading minority communities viz. the Muslims, the Depressed classes, the Indian Christian and the Anglo-Indians Jointly presented a demand for the retention of a separate electorate. Then in August, 1935, finding no other possibility of any agreed solution about the communal problem, the Prime Minister announced the Government's scheme of minority representation known as the Communal Award. The scheme was roughly a reproduction of the existing system and its only justification was that it was in accordance with the Lucknow Pact of 1916. As Coupland says," the communal problem had only been prevented from blocking the whole progress of the Conference by the British Government's unilateral decision to maintain the old, unsatisfactory system."[9]

When the Joint Select Committee Report was debated in February 1935 in the Central Legislative Assembly, the Congress spokesmen moved that it should not be passed into law since it conceded no real power to the Indians. The Muslim League was not so much opposed to the scheme. In the resolutions proposed by Mr. Jinnah, the Communal Award was accepted, abolition of dyarchy in the Provinces was hailed as a real advance but the plan of All India Federation was denounced because of its failure to introduce full responsibility in the Centre. Then again, when the All India Muslim League held its session in April 1936, Sir Syed Wazir Hussain said in his presidential speech :

"A Constitution, is literally being forced on us by the British Parliament which nobody likes, which no one approves of. After several years of Commissions, Reports, Conferences and Committees' a monstrosity has been invented and is being presented to India in

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[9] Coupland, R.: *Op. cit.*, Part I, p. 131.

the garb of this Constitutional Act. It is anti-democratic. It will strengthen all the most reactionary elements in the country and instead of helping us to develop on progressive lines, it will enchain and crush the forces making for democracy and freedom."[10]

Following this principle, the League also condemned the Act. There was, of course, a slight difference between the attitude of the Congress and that of the League. Congress was for rejecting the Act in toto, whilst the League denounced the 'safeguards' only and recommended that 'having regard to the conditions prevailing at present in the country, the Provincial scheme of the Constitution be utilised for what it is worth. *[11]

In the election manifesto of the League "the federal scheme was damned as heartily as any Congressman could wish. The Provincial scheme also was severely criticised but nothing was said about destroying it."[12]

In the meantime Congress also presented its objection to the federation for reasons of its own. The Congress held its session in December 1936 at Faizpur...."Perhaps the most important of the subjects considered at Faizpur related to the elections and the Constituent Assembly....and the hartal on April 1, 1937. The last was meant to demonstrate effectively the will of the Indian people to resist the imposition of the unwanted Constitution which, the Congress considered, would be a betrayal of India's struggle for freedom and only result in strengthening the hold of British Imperialism and a further exploitation of the Indian masses."[13]

Inspite of the fact that the majority of the Congress members were opposed to the federal portion of the Act, because of the Governor General's overriding powers and the safeguards and for want of complete responsibility at the Centre, it was decided to contest the elections, not to submit to this constitution or co-operate with it but to combat it both inside and outside the legislatures so as to end it.[14]

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[10] Presidential address of Sir Syed Wazir Hussain in the All India Muslim League session in April 1936.

[11] Quoted in Coupland : *Op. cit.* Part II, p. 8.

[12] Quoted in Coupland : *Op. cit.* Part II, p. 14.

[13] Sitaramayya Pattabhi : The History of the Indian National Congress Vol. II, p. 35.

[14] Congress Resolution at the Faizpur Session 1936.

Elections to the Provincial Legislatures were held in 1937. Congress had overwhelming success at the election. It was able to secure an absolute majority in five provinces viz., Madras, U.P., C.P., Bihar and Orissa. It was the biggest single party in four provinces viz. Bombay, Bengal, Assam and North Western Frontier Province. After the election the Working Committee offered its thanks to the nation in the following words :

"The Working Committee congratulates the nation on its wonderful response to the call of the Congress during the recent elections, demonstrating the adherence of the masses to Congress policy and their firm determination to combat the new Constitution and end it, and by means of a Constituent Assembly to establish an independent and democratic State...."[15]

Among the Congress policies which the newly elected Legislatures were to follow, resistance to the introduction and working of the Federal Part of the Act occupied an important place. The question of acceptance of office now came to the fore and by a resolution in March 1937, the All India Congress Committee claimed an assurance from the Governors that their special power of interference would not be used and the advice of the ministers would not be set aside. The British Ministers replied that without amendment of the Act, no such assurance could be given by the Governors. So in the provinces having Congress majority, interim ministries were formed. The controversy which arose on the Congress demand, was finally resolved by a statement of Lord Linlithgow on 22nd June, 1937. He clearly laid it down that the special responsibilities of the Governor would not entitle him to interfere in the work of the ministers at random. In July 1937 the Congress Working Committee considered at Wardha that Congressmen should be allowed to accept office. After acceptance of office inspite of the assurance by the Viceroy, the Congress Ministry in U.P. and Bihar felt interference in day to day administration. When the Governors invited Congress members to form ministries, they knew that release of political prisoners was one of the major issues in the Congress policy. The Ministers began to release the political prisoners and in this there was undesirable delay because the Governors would not endorse the release orders. When the Working

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15 Sitarammayya Pattabhi : *Op. cit.* Vol. II. p. 40.

Committee of the Congress met after this, it considered this matter of release of the political prisoners as falling within the day to day business of the ministers and instructed the Ministers to order release of the political prisoners in their charge and if there was any hindrance to the carrying out of their duties, to resign. The conflict ultimately compelled the ministers to resign. According to the Congress it was a misapplication of the powers conferred by the Government of India Act 1935, because there was no question of a grave menace to the peace and tranquility of the province.

Throughout 1937, the Congress continued its programme of opposing the federal portion of the Act. The Congress instructed the Provincial Governments and Ministers to give formal expression to their opposition to that part of the Act. Next year, that is, in 1938 the fifty-first session of the Congress was held at Haripura under the presidentship of Mr. Subhas Chandra Bose and immediately before the session he elaborated the policy he would adopt by saying,

"My term of office as the Congress President will be devoted to resist this unwanted federal scheme with all its undemocratic and anti-national features, with all the peaceful and legitimate powers, including non-violent non-cooperation if necessary, and to strengthen the country's determination to resist this scheme."[16]

Thus Provincial Autonomy was being operated in a spirit of combat. It cannot be gainsaid that by the Act of 1935 India would not attain Dominion Status, which consisted of equality between India and Britain and the Dominions. There was, of course, some resemblance between India and the Dominions, which was brought about by the Government of India Act 1935. There was, on the whole, a federal form of government in which the Provinces were co-ordinate and not subordinate to the Centre. There was the provision for indirect or Provincial election to the lower house of the Central Legislature. There was also a Parliamentary system of government. But dyarchy at the centre, which made defence and foreign affairs reserved subjects in charge of the Governor-General responsible to the Secretary of State, the novel feature of the safeguards which went against the introduction of a responsible government and the subordination

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[16] Sitaramayya Pattabhi : *Op. cit.* Vol. II, p. 73.

of the Indian Legislatures to the British Parliament made the equality of India with other Dominions to remain still an Utopian idea and Congress took a militant attitude against this Constitution which was presumed to be a superimposition upon the Indians.

It is true that the 'safeguards' constituted the obnoxious feature of the Act of 1935 but as Sir Samuel Hoare said in the House of Commons, the safeguards were incorporated as a result of the demand of the Indians themselves.

"The safeguards", he said, "that necessarily take so prominent a place in the White Paper are designed just as much in the Indian interests as in British interests. Indeed one of the most significant facts of the proceedings of the Round Table Conference last September was the demand of Indians themselves for safeguards. There day after day Hindus or Sikhs in the Punjab were demanding safeguards for their minority communities ; Moslems were demanding safeguards in the Hindu Provinces ; the Depressed Classes were demanding safeguards in their interests in Provinces where there are many members of the Depressed classes. Take another instance—the demand reiterated by all the Indian minorities for the declaration of fundamental rights in addition to their demands for safeguards. I state these facts today to show that these safeguards are just as necessary and just as strongly demanded by Indian public opinion as they are by British public opinion here."[17]

Lord Linlithgow also said on 22nd June that the Governors were not partisans and if any Ministry was willing to work the Constitution, the Governor's experience and advice were at his disposal. The Governors would entertain any programme of the Ministry for the improvement of the Province provided it did not clash with the special responsibility of the Governors and those responsibilities did not permit the Governor 'to intervene at random in the administration of the Province.' From practical experience of the working of the Act, we find that only in two Provinces, U.P. and Bihar, the Governors interfered with the day to day administration of the Congress and there was occasion for it only once.

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[17] Speech delivered in the House of Commons on 27th March, 1933, on the Motion to appoint the Joint Select Committee.

The main charge against the Centre was the autocratic powers of the Governor-General and the retention of dyarchy. The British point of view about this is made clear by the statement of Sir Samuel Hoare in the House of Commons on two different occasions. In December 1931, he said,

"There is the point about law and order. What we mean is not that the British Government or the Government of India should intervene in the day to day details of Indian administration. If we meant that, it would be a mere farce to talk about any transfer of responsibility at all, either at the Centre or in the Provinces. What we mean is that in extreme cases there must be an ultimate power somewhere, and that ultimate power would reside in the Provincial Governors and the Viceroy."[18]

Again in March 1932 he said,

"We feel it the primary duty of this or any other Government to maintain law and order and to prevent India from drifting into anarchy and chaos. That does not mean that we believe that the country can be governed for ever by Ordinances. Ordinances are, in the nature of their character, meant to deal with an emergency."[19]

R. Coupland says that the Government of India Act 1935 enlarged to a limited extent, the scope of the Governor-General's personal authority for though it curtailed the general power of the Centre over the Provinces, yet it provided that the Governor-General 'personally' and not the Governor-General-in-Council should control the Provincial Governors when they were 'exercising their individual judgement' or 'acting in their discretion' or in other words if they were obliged to operate safeguards.[20]

But in all other fields the Governor-General had to work with his Executive Councillors, who together with him, constituted a statutory corporation. They made collective decisions for which they were collectively responsible. He was not their master but their equal and members incharge of Departments were not responsible to the Governor-General personally but to the whole

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[18] Sir Samuel Hoare in the House of Commons, 2nd December, 1931.
[19] Sir Samuel Hoare : in the House of Commons on the 24th March, 1932.
[20] Coupland, R.: *Op. cit.* Part II, p. 227.

Council. Except those few matters in which he was expected to exercise his personal authority, the Governor-General was expected to accept the majority decision of the Council.

When the Second World War broke out, the Congress asserted that Great Britain had declared India to be at war with the Axis Party without taking the consent of the Indians. In reply to that Coupland presents the following argument.

"If the Princes had not recoiled from the federal scheme, if the Congress and the League had been willing to play the same part at the new Centre as they did in the Provinces, and if in consequence the federal part of the Act of 1935 had come into force at the same time as the Provincial part or not long after, it is not ureasonable to believe that by the autumn of 1939 the new Centre would have been working at least as smoothly as the new Provincial system did in fact work in the non-Congress Provinces and more smoothly than it worked in the Congress Provinces."[21]

He continues to say that in that case, the responsible ministers in all other Central Departments excepting defence and foreign affairs, would have felt that their powers were real powers. Though defence and foreign affairs would still have been reserved to the Viceroy assisted by Councillors "it may be taken for granted that under stress of the approaching crisis, the Viceroy would have taken the whole cabinet into his confidence, explaining the gravity of the world situation and elucidating....the strategic factors.... And finally when war actually came, it seems probable, so great was the general repulsion against Hitler's aggression that Ministers would have backed without question the Viceroy's proclamation of war and brought with them the backing of the legislature."[22]

It was not possible to bring about any vital change during the war. But just after the War, that is, in 1945 in the Simla Conference the Viceroy proposed to extend the number of Indian members in the Executive Council. This proposal struck against the stumbling block of a League proposal that Congress should nominate only Hindu members. As Maulana Abul Kalam Azad

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21 Coupland, R.: *Op. cit.* Part II, p. 211.
22 *Ibid.*, p. 211.

said, "The Simla Conference marks a breakwater in Indian political history. This was the first time that negotiations failed, not on the basic political issue between India and Britain but on the communal issue dividing different Indian groups."[23]

In order to understand what happened in the meantime we have to retrace our steps a few years back. Before 1937 it was the Congress which was for total rejection of the Act of 1935. The League wanted to work the Provincial Constitution, "for what it was worth". But this attitude of the League was soon changed. For this R. Coupland blames the Congress decision to form no coalition. Speaking about the position in 1937 he says,

"In five Provinces the Congress obtained clear majorities. In two others they only needed the support of one or two sympathetic groups. Broadly speaking, therefore, there was no necessity for Congress to come to terms with minority parties, not even with the strongest of them, the Muslim League. There was no bar to the application of the totalitarian doctrine that the best representatives of the minorities were to be found in the Congress ranks. The 'high command' accordingly decided that there should be no Congress-League coalitions."[24]

But if we consider what happened in Sind, we find that the charge of Coupland is unfounded.

"When....the Sind Ministry was voted down and the Premier had to resign, the formation of an alternative ministry largely was dependent upon the attitude of friendliness or otherwise that might be adopted by the Congress Party towards the aspirants to office. On this occasion, the leader of the Sind Assembly Congress Party was invited by the Governor to explain the Congress attitude towards the crisis.... Under the circumstances the Congress Party replied to the effect that while retaining its full freedom to oppose any legislative or administrative action of the New Ministry, they would watch its work for a reasonable time and would not till then initiate or support a move which would defeat the ministry.... Thus was the way paved for the formation of coalition ministry and the events that happened in Sind virtually repeated themselves later in Assam."[25]

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[23] Azad Mau'ana Abul Kalam : India Wins Freedom, p. 110.
[24] Coupland, R.: *Op. cit.* Part II, p. 110.
[25] Sitaramayya Pattabhi : *Op. cit.* Vol. II, p. 90.

It is true that the Congress leaders always claimed that it was a national party. But in October 1937 in the Lucknow Conference, Mr. Jinnah denounced the Congress for following an exclusively Hindu policy and in 1938 insisted that the League was the only Muslim organization to which the Congress leaders naturally could not acquiesce.

Next the Muslim League brought a charge of atrocity against the Congress Government in the Provinces and in three Reports, published one after another, they tried to prove it. The first among them was the Report of the Inquiry Committee appointed by the Council of the All India Muslim League, generally known as the Pirpur Report published at the end of 1938. It attacked the so-called "closed door" policy of the Congress and cited it as proof that Parliamentary government as practised in Great Britian, was unworkable in India. "The Muslims think," it said, "that no tyranny can be as great as the tyranny of the majority."[26]

The second was the Report of the Enquiry Committee appointed by the Working Committee of the Bihar Provincial Muslim League to enquire into some grievances of Muslims in Bihar. This was published in March 1939 and was known as the Shareef Report. It consisted for the most part of a full description of the so-called atrocities perpetrated by Hindus in various places in Bihar. In a resolution of the Working Committee of the Bihar Provincial Muslim League, it was said, "Muslims will have to decide soon whether they should migrate from this Province or face annihilation."[27]

The third attack came from Mr. Fazl-Ul-Huq, who published in December 1939, a pamphlet entitled Muslims suffering under Congress Rule. There was a description of 72 incidents in Bihar and 33 in the United Province and a more summary account of similar events in the Central Province.

These charges are refuted by Maulana Abul Kalam Azad who says, "I can speak from personal knowledge that these allegations were absolutely unfounded. This was also the view

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[26] Coupland, R.: *Op. cit.* Part II, p. 185.
[27] Quoted in Coupland, R :. *Op. cit.* Part II, p. 186.

which was held by the Viceroy and the Governors of different provinces."[28]

Coupland, who is a bitter critic of every movement of the Congress, also speaks in favour of the Congress in this connection. "One thing however," says he, "can be stated with some certainty. The Congress governments as a whole wanted to be just to the minorities. There is high and impartial authority for that in the United Province where the quarrel was at least as bitter as in Bihar."[29]

R. Coupland refers to the writing of Sir Harry Haig, the Governor of U. P., who after his retirement in 1939 praised the Congress for its impartiality and "a desire to do what was fair."[30]

Coupland mentions the fact that Congress insisted on its non-communal character and naturally it was eager to prove that it was commuanlly neutral. Moreover there were Congress Moslem ministers, who could hardly acquiesce to a policy of Moslem persecution.

Referring to the charges of the Muslim League, Maulana Abul Kalam Azad writes,

"When Congress accepted office, a Parliamentary Board was formed to supervise the work of the Ministries and give them general guidance on policy. The Board consisted of Sardar Patel, Dr. Rajendra Prasad and myself. I was thus incharge of the parliamentary affairs in several provinces viz. Bengal, Bihar, U. P., Punjab, Sind and the Frontier. Every incident which involed communal issues came up before me. From personal knowledge and with a full sense of responsibility I can therefore say that the charges levelled by Mr. Jinnah and the Muslim League with regard to injustice to Muslims and other minorities were absolutely false. If there had been an iota of truth in any of these charges, I would have seen to it that the injustice was rectified. I was even prepared to resign if necessary, on an issue like this."[31]

In June 1940, Mr. Jinnah declared that the Muslims were a different nation from the Hindus and they should have a

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[28] Azad Maulana Abul Kalam : *Op. cit.* pp. 21-22.
[29] Coupland, R.: *Op. cit.* Part II p. 188.
[30] Asiatic Review, July 1940, p. 428.
[31] Azad Maulana Abul Kalam : *Op. cit.*, p. 22.

Dominion of their own. This demand grew more and more insistent until it ultimately led to the partition of the country with its many evils.

What was it then that prompted the Muslim League to take the militant attitude against the Congress which ultimately led to a demand for partition ? The communal question was not solved when Provincial autonomy came into force. Inspite of the fact that by the Communal Award they were in a privileged position, the League, could form government in four Provinces only, of which two became Congress Provinces soon. Coupland blames Congress for not agreeing to coalition which is of course, a false charge. But even if there was partial truth in it, the very fact that Congress did not need any coalition proves its popularity. The Muslim League claimed itself to be the only Muslim organization. Yet there were Muslims who belonged to Congress and pro-Congress parties. In the Congress itself, there were two prominent leaders, Maulana Abul Kalam Azad and Mr. Asaf Ali. The Congress was achieving international fame. So these factors that Congress could win majority in most of the Provinces, Congress needed no coalition, Congress was a non-communal organisation and Congress was gaining international fame,— combined together to make the League jealous of the Congress. Charges were brought against the Congress which, inspite of being false, were believed by the unlettered Muslim masses, who generally had a credulous mind as well as by some of the educated Muslims who were really anxious for the future of the community. Now the League began to denounce the Act. Thus we find that the same League which spoke in the Central Legislative Assembly against the unfair demand of the States, now criticised the Congress for its sympathy in the States' People's Movement. In the Patna session of the Muslim League in 1938, it declared that the Congress', "main objective in championing the cause of the States' people is only to secure the establishment in the Indian States of an elective system enabling their representatives to be returned to the Federal Legislature, irrespective of anything else, in the hope that it might get a majority."[32]

The War broke out now. The Congress brought the charge against the British that they had declared India to be belligerent

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[32] Quoted in Coupland, R.: *Op. cit.* Part II, page 197.

without referring the question to the Legislative Assembly. When the League found that the Congress was opposing the war, they declared their support of the War and when the Congress ministry were forced to resign, they announced that day to be a Day of Deliverence.

Thus the League resolution for a separate Dominion had a ground for germinating and Mr. Jinnah, who was so long one of the leaders of the Moslem Community, fast became, "the leader". Maulana Azad says that for the spreading of the idea of Pakistan, certain Hindu extremists were also responsible. "When the Muslim League began to speak of Pakistan," says Maulana Azad, "they read into the scheme a sinister Pan-Islamic conspiracy and began to oppose it out of fear that it foreshadowed a combination of Indian Muslims with trans-Indian Muslim States.

"The opposition acted as an incentive to the adherents of the League. With simple though untenable logic, they argued that if Hindus were so opposed to Pakistan, surely it must be of benefit to Muslims. An atmosphere of emotional frenzy was created which made reasonable appraisement impossible and swept away especially the younger, and more impressionable among the Muslims."[33]

The basis of Pakistan was the fear of interference by the Centre in Muslim majority areas as the Hindus were expected to be in a majority in the Centre. This fear could be met if the Congress as well as the League had accepted the federal scheme of the Government of India Act of 1935, "for what it was worth". Actual working of the Act would have shown the Muslim that the fear of interference was an unfounded one and Provincial autonomy was a genuine autonomy. But this was not to be. The Congress was thus partially responsible for what happened later.

The British also could not see the writings on the wall. If they knew that they would have to leave India so soon, they might not fan the fire of communal jealousy by granting communal electorate in 1905, by providing for 'safeguards' for minorities, by granting the Communal Award and in sundry other ways. As such the country has been divided to the benefit of none.

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[33] Azad Maulana Abul Kalam : *Op. cit.*, p. 144.

"The only result of the creation of Pakistan," writes Maulana Azad, "was to weaken the position of the Muslims in the sub-continent of India. The 45 million Muslims who have remained in India have been weakened....Can anyone deny that the creation of Pakistan has not solved the communal problem, but made it more intense and harmful ?"[34]

Azad then refers to the fact that the creation of Pakistan has given a constitutional recognition to the two nation theory which was so vehemently opposed by the Congress. The hatred and fear on both sides have led the two states to increase their defence expenditure and no good has come out of it. It is true that the Act of 1935 was loaded with a conservative bias. There was the provision for dyarchy at the Centre, Communal Award for the representation of the minorities, the Governor-General, as also the Governors had the power of acting in their discretion, acting in individual judgement and of issuing Ordinances. There was also the right granted to the Princes that after accession, they were to nominate the representatives to the Federal Legislature. So it would not have been easy to work the Act.

Yet if it was accepted for what it was worth, the Constitutional history of India might have taken a different colour. Perhaps with the cooling of passions the Act might have been made workable. In that case the avoidance of Partition might not have been impossible.

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[34] Azad Maulana Abul Kalam : *Op. cit.*, p. 226.

CHAPTER VI | THE PERIOD OF TRANSITION

Non-recognition of India's right to immediate freedom was a stumbling block due to which the British invitation to India for co-operation in the War was frustrated. At first the Congress attitude was one of indecision. It wanted the defeat of fascism but England was not declaring her War aims. On 14th September, 1939, the Congress presented its demands which included the declaration of War aims by the British and the method of its application to India, the formation of a Constituent Assembly without external influence and declaration of immediate independence of India. But on 18th October 1939, the Viceroy declared that though Dominion Status remained their ideal, the British could not promise immediate establishment of the same. They contemplated the realisation of the Indian aspiration in, the post-war period after consultation with leaders of different opinions in India. The Congress saw this promised goal eluding their grasp again and again like willow-the-wisp and considered it paradoxical for a nation in bondage to fight for the freedom of other nations. The Congress ministers resigned between October and November 1939. When Provincial Autonomy was suspended in the Congress majority Provinces and was replaced by the dictatorial rule of the Governor, Mr. Jinnah asked the Muslims to celebrate this day as the "Day of Deliverence."

Immediately after the outbreak of War, Sir Stafford Cripps once came to India. On his return from India, he declared in the House of Commons on October 26th 1939 :

"Most of the Indians to-day are looking forward for a lead from the Congress. They expect everything from the Congress and they are opposed to Mr. Jinnah's scheme of dividing India."[1]

About the immediate solution of the communal problem he said, "I am convinced that India's salvation remains in a Constituent Assembly."[2]

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[1] Stafford Cripps in the House of Commons, October, 26th 1939.
[2] *Ibid.*

After this on the 19th November 1939, Gandhiji also said that the only way out of the impasse lay in the Constituent Assembly. He was ready to offer separate votes in it to all the minorities including the League Muslims as well as non-League Muslims. The British were trying to evade the issue of the Constituent Assembly as this would be detrimental to their imperialistic policy in India. On 25th January 1940, the Standing Committee of the Chamber of Princes discussed the implication of the Viceroy's statement.

"The rulers demanded that no commitment affecting their rights or interests should be made without their consent. Lord Linlithgow undertook to honour in full the treaty obligations of His Majesty's Government. Subsequently, at a meeting of the Chamber of Princes held in March 1940, the rulers declared their determination to render every possible assistance to His Majesty's Government in the prosecution of the War aims of the Allies."[3]

But the Viceroy's promise of Dominion Status depended upon one factor. The British would grant Dominion Status to India "subject to local adjustment between the leaders of the great communities" and the Congress thought that the communal question could never be satisfactorily solved so long as both the parties looked to a third party for the solution of all their problems. Thus it became a vicious circle. Then again the viewpoint from which the British and the Congress looked at the question was not the same. The Congress took exception not only to the continuous post-ponement of the granting of Dominion Status but it raised the question of self-determination. It could no longer tolerate the patronising attitude of the British and wanted Purna Swaraj.

"The Princes", Gandhiji said, "are free to join the National Assembly which will determine India's fate as duly elected representatives of their people, not as individuals. They are only vassals of the Crown and cannot have power superior to the Crown itself nor status apart from the Crown. If the Crown itself parts with the power it enjoys, naturally the Princes have to look up to the successor of the Crown viz. the people of India".[4]

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[3] Menon V. P.: The Story of the Integration of the Indian States, p. 46.

[4] Statement of Gandhiji on February 6th, 1940 quoted in Sitaramayya Pattabhi : History of the Indian National Congress Vol., 2, p. 163.

In 1940, Mr. Jinnah declared that the Muslims were a different nation from the Hindus and they should have a separate Dominion of their own. The following resolution was passed at the Lahore session of the League :—

"Resolved that....no constitutional plan would be workable in this country or acceptable to the Muslims, unless it is designed on the following basic principle, viz. that geographically contiguous units are demarcated into regions which should be so constituted, with such territorial readjustments as may be necessary, that the areas in which the Muslims are numerically in a majority, as in the North-Western and Eastern Zones of India, should be grouped to constitute 'Independent States' in which the constituent units shall be autonomous and sovereign."[5]

As a result of pressure from Indian opinion which was constant in its demand of self-determination, the British Government decided to send Sir Stafford Crips, the new leader of the House of Commons on his famous mission to India. Cripps came to India once more with the Draft declaration for discussion with Indian leaders. The Cripps' offer consisted of two parts. Its immediate object was to bring about a war time central government in India which would consist of representatives of political parties in British India. The long term plan as revealed by the Draft Declaration was as follows :

> "(a) immediately upon the cessation of hostilities, steps shall be taken to set up in India, in the manner described hereafter, an elected body charged with the task of framing a new Constitution for India.

"(b) Provision shall be made, as set out below, for the participation of the Indian States in the Constitution making body."

"(c) His Majesty's Government undertake to accept and implement forthwith the Constitution so framed subject only to :"

"(i) the right of any Province of British India that is not prepared to accept the new Constitution, to retain its present Constitutional position, provision being made for its subsequent accession if it so decides."

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[5] Muslim League Resolution passed at the 27th Annual Session of the All India Muslim League at Lahore, 23rd and 24th March, 1940.

"With such non-acceding Provinces, should they so desire, His Majesty's Government will be prepared to agree upon a new Constitution, giving them the same full status as Indian Union and arrived at by a procedure analogous to that here laid down."

"(ii) the signing of a Treaty which shall be negotiated between His Majesty's Government and the Constitution making body. This Treaty will cover all necessary matters arising out of the complete transfer of responsibility from British to Indian hands ; it will make provision, in accordance with the undertakings given by His Majesty's Government for the protection of racial and religious minorities....."

"Whether or not an Indian State elects to adhere to the Constitution, it will be necessary to negotiate a revision of its Treaty arrangements, so far as this may be required in the new situation."

"(d) The Constitution-making body shall be composed as follows, unless the leaders of Indian opinion in the principal communities agree upon some other form before the end of hostilities :"—

"Immediately upon the result being known of the provincial elections which will be necessary at the end of hostilities, the entire membership of the Lower Houses of the Provincial Legislatures shall, as a single electoral college, proceed to the election of the Constitution-making body by the system of proportional representation.....,,

"Indian States shall be invited to appoint representatives in the same proportion to their total population as in the case of the representatives of British India as a whole, and with the same powers as the British Indian members."[6]

As regards the demand for a change during the war, the British Government decided that the primary responsibility for the defence of India must remain with them.

The Rulers of the States took exception to that part of the Declaration which related to the revision of treaty with them. But the apprehension of the Rulers was driven away by the remark of Cripps that treaties relating to economic matters of common

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[6] Draft declaration for discussion with Indian Leaders, 30th March, 1942. Cmd 6350.

concern only would be revised and not the treaties relating to Paramountcy or protection of the States. Yet the States had their own doubts about the meaning of adherence to the Union, whether it would mean loss of dynastic and personal rule by the princes, whether the Union would acquire Paramountcy over the adhering States, whether the States' subjects would become Union Subjects and many such things.

On behalf of the Indian States' Delegation Jam Saheb of Nawanagar wrote to Sir Stafford Cripps on 10th April, 1942 :

".....The Indian States will be glad as always, in the interest of the Motherland, to make their contribution in every reasonable manner compatible with the sovereignty and integrity of the States, towards the framing of a new Constitution for India."

"The States should be assured, however, that in the event of a number of States not finding it feasible to adhere, the non-adhering States or group of States so desiring should have the right to form a Union of their own, with full sovereign status in accordance with a suitable and agreed procedure devised for the purpose."[7]

Thus the Cripps' proposal "embodied different items palatable to different tastes. To the Congress there was the preamble which spoke of Dominion Status, the Westminister Act and the right to secede and above all the Constituent Assembly."..

To the Muslim League, there was the highly comforting provision that provinces had the right of not acceding to the Indian Union. The Princes were not only left free to join or not to join but were given the sole right to send representatives to the Constituent Assembly and the people of the States were severely left alone."[8]

But the shortcoming of the proposal loomed large in the eyes of all concerned. The right to non-accession to the Indian Union was thought to be a dangerous provision, as it would open the way not only for the establishment of Pakistan but it would give a golden opportunity to all reactionary elements to "frustrate the

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[7] Extract from the letter of Jam Saheb of Nawanagar to Sir Stafford Cripps, dated 10th April, 1942.

[8] Sitarammayya Pattabhi : History of the Indian National Congress, Vol. II, p. 315.

evolution of a strong, progressive, unified national state."[9] Again, said Nehru, "They opened a Vista of an indefinite number of partitions both of provinces and States. They incited all the reactionary, feudal and socially backward groups to claim partition."[10]

As it was rather difficult to understand why the Provinces were given the right to opt out, Maulana Azad put the question to Sir Stafford. This is what he says.

"I told Cripps that the right given to the Provinces to opt out meant opening the door to separation. Cripps tried to defend his position by pointing out that the right was given to a Province as a whole and not to any particular community. He was convinced that once the right of the Provinces to opt out was recognised, no province would, in fact, demand that right. Not to concede the right would, on the other hand, rouse suspicion and doubt."[11]

Inspite of Cripps' assertion to the contrary, nobody could over-look the defects of the proposal. The Constitution-making body as provided by it, would be a chequer board of elected and non-elected elements, the elected element being returned by Communal electorates. Then again the States' representatives in the Constitution-making body would be representatives of the Rulers and not of the people. Thus the long term plan not only continued the policy of divide and rule but carried it to the extreme.

It was said about the immediate reform that all other subjects except Defence would be transferred to Indian hands. This appeared to be a grim irony to Indians because in war time, anything and everything might be included in the term 'Defence'. The disappointment of the Indians was aptly summarised by Shree Nehru when he said :

"So it all came to this that the existing structure of government would continue exactly as before, the autocratic powers of the Viceroy would remain, and a few of us could become his liveried camp followers."[12]

Unsatisfactory, as its conditions were, the Cripps' offer was rejected by the Congress Working Committee on 10th April. In

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9 Nehru Jawaharlal : The Discovery of India (Second Edition) p. 399.
10 *Ibid*., p. 401.
11 Azad Maulana Abul Kalam : India Wins Freedom, p. 58.
12 Nehru Jawaharlal : *Op. cit.*, p. 406.

order to understand the full implication of Congress objection to the Cripps' offer, we have to pay attention not only to the text of the Declaration but to what was hapening behind the screen. Soon after his arrival in New Delhi, a meeting took place between Sir Stafford Cripps and Maulana Abul Kalam Azad on 29th March 1942. At this time the former handed over to the Maulana a statement embodying the proposals which he had brought to India. The Maulana found that in it there was a proposal for a new Executive Council of the Viceroy. All the existing members would have to resign and then Congress and other representative parties would send their nominees who would constitute the Executive Council, which would work through the War period.

"The net result of the proposal was," writes Maulana Azad, "that in place of majority of the British members in the existing Executive Council, there would be an Executive Council composed of Indians alone. British officers would remain as Secretaries, but not as members of the Council."[13]

The Viceroy, as Sir Stafford said would function as a Constitutional head like the king in the United Kingdom and it was the intention of the British authorities that the Viceroy as the constitutional head would be bound by the advice of the Council.

A meeting of the Congress Working Committee was called on 29th March, 1942 to discuss the situation. In it Gandhiji showed himself against the acceptance of the proposal not because of his objection to the proposal itself but because of his instinctive dislike of anything that might involve India in War. But Azad thought that Jawaharlal was favourably disposed towards the proposal. This is what Azad says, "Jawaharlal was deeply troubled by the developments in Europe and Asia, and was anxious concerning the fate of the democracies. His natural sympathies were with them and he wanted to help them as far as possible. He was therefore inclined to consider the proposals favourably. Indian feeling against the British was so strong at the time that he could not state his position clearly and emphatically. I could, however, read his unspoken thoughts and sympathized generally with his views."[14]

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[13] Azad Maulana Abul Kalam : *Op. cit.*, p 49.
[14] Azad Maulana Abul Kalam : *Op. cit.*, p. 50.

As there was only verbal discussion between Sir Stafford and Maulana Azad about the Executive Council and the Viceroy's position as a constitutional head, the Working Committee wanted the Maulana to make this point clear. So there was another meeting between the two on 1 April 1942. This time when the Maulana asked Cripps whether the Executive Council would decide all issues by majority and whether its decision would be final, Sir Stafford began to give ambiguous reply. Though he did not say so clearly, it was understood from what he said that the decision of the Council would not be final. He said that the Viceroy's position could not be changed without a change in law.

About the independence of India also Cripps did not give any categorical answer. "Cripps said that the problem of India would be considered from a new angle after the War and she would get the opportunity of deciding her own fate. He added that, as a friend, he would venture to advise that we should not raise any fresh difficulty by asking new questions. India should accept the proposals at their face value and go forward. He had no doubt in his mind that if India co-operated fully with Britain during the war, her freedom after the War was assured."[15]

Why Sir Stafford changed his position during the first and second interviews has remained a mystery. In *India Wins Freedom* Azad tries to give three different explanations for this. The first explanation is that he had expected to do away with all objections by his persuasive power and in order to create a favourable impression had given categorical assurances at the beginning. But when he was subjected to cross examination he grew cautious and refrained from raising hopes which he knew he could not satisfy. Another explanation is that during his first and second meetings with Azad, the inner circle of the Government of India had influenced him. The third alternative as guessed by Azad is that the British War Cabinet had sent him fresh instructions and he felt, that if he went too far, he might be repudiated. The third explanation seems to be more plausible than the second one because Sir Stafford came and acted here as the agent of His Majesty's Government in Britain. Moreover the British War Cabinet was more likely to take interest

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15 *Ibid.*, p. 52.

in the Indian question as it now concerned the constitutional power of the Indian Executive Council during War time.

This also seems to be the view of Azad in 1942 when he wrote to Sir Stafford Cripps :—

"It seems that there has been a progressive deterioration in the British Government's attitude as our negotiations proceeded. What we were told in our very first talk with you is now denied or explained away. You told me then that there would be a National Government which would function as a Cabinet and that the position of the Viceroy would be analogous to that of the king-in-England vis-a-vis his Cabinet.

"The whole of this picture which you sketched before us has now been completely shattered by what you told us during our last interview."[16]

The Muslim League also rejected the proposal on the very day of Congress refusal on grounds of their own. Their Resolution ran as follows :

"So far as the Muslim League is concerned, it has finally decided that the only solution of India's Constitutional problem is the partition of India into independent zones ; and it will, therefore, be unfair to the Musalmans to compel them to enter such a Constitution-making body whose main object is the creation of a new Indian Union."[17]

The Working Committee of the Hindu Mahasabha and the Sikh All Parties Committee also rejected the Cripps' proposal. The Congress and some other parties like the Hindu Mahasabha were apprehensive of the provision for non-accession by Groups. The Congress, moreover, stood against the concession granted to the Princes to send representative to the Constitution-making body to the total exclusion of millions of people in the States, the Princes had a fear that the Union might dominate over the acceding States and revision of treaty relation with even the non-acceding States might affect their relation with the Paramount Power. The Muslim League thought there was no direct grant of Pakistan. Baffled in his attempt to bring about a solution of

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[16] Extract from the letter from Maulana Azad to Sir Stafford Cripps, dated 11th April, 1942.

[17] Resolution of the Muslim League adopted on the 10th April, 1942.

the Indian problem, Sir Stafford Cripps returned to England on the 12th April, 1942.

The main event between the return of Cripps to England and the coming of the Cabinet Mission to India was the "Quit India" Resolution adopted by the Congress Working Committee when it met at Bombay in August, 1942. This was followed by the immediate arrest of all the Congress leaders and widespread mass revolution in India which was suppressed by the British with an iron hand.

Indian politics remained in the same condition for the last two years of the War. In the meantime Mahatma Gandhi was released from detention. With the approval of Mahatmaji, Mr. C. Rajagopalachari made an attempt to come to an understanding with Mr. Jinnah. The broad principles on which Mr. Jinnah's approval was sought were that after the cessation of hostilities between the Allies and Axis parties,

"(A) A Commission shall be appointed to mark out contiguous areas in the north-west and north-east of India where the Muslim population is in a majority.

"(B) In these two areas there shall be a universal plebiscite and if the majority of the population vote in favour of a separate sovereign State, such a state shall be formed."[18]

These proposal, it is evident, went a long way towards the acceptance of the demands of the Muslim League for Pakistan. But the proposal was rejected by the League. In a letter which he wrote to Mahatma Gandhi, Mr. Jinnah said, "We claim the right of self-determination as a nation and not as a territorial unit."[19]

Events moved at a swift pace after the Second World War. The Labour Party won the elections in Great Britain. After that new attempts were made to solve the political problem in India. The British Government sent three of its members viz. The Secretary of States (Lord Pethick Lawrence), the President of the Board of Trade (Sir Stafford Cripps), and the First Lord of Admiralty (Mr. A. V. Alexander) on a mission to India to solve the constitutional problem in consultation with the leaders of important political parties. On May 16th 1946, the Cabinet

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[18] Sitarammayya Pattabhi : *Op. cit.*, Vol. 2 pp. 631-632.
[19] Letter of Mr. Jinnah to Mahatma Gandhi on the 19th Sept., 1944.

Mission published a State Paper giving an outline of the proposed future Constitution of India. It stated that the Muslims in India had a real and deepseated apprehension about the possibility of the suppression of their interest in a free and united India. So the League demanded Pakistan and they did not want the territory of the same to be confined within the Muslim majority parts of India. They demanded that some non-Muslim parts of India also should be included within Pakistan for administrative and economic conveniences. The State Paper said that there was no legitimate ground for the inclusion of the non-Muslim parts of Bengal and the Punjab within the preccints of Pakistan. So it was not feasible to grant a Greater Pakistan to the League. A smaller Pakistan also would entail various administrative and economic difficulties. So neither was thought to be practicable. Then again there were the administrative, economic and military considerations. The defence and communication of India were established on the basis of a united India. There were also other considerations e.g. the difficulties which would be felt by the Indian States in joining either of the two Dominions. There would again be no geographical contigunity between the two halves of the proposed Pakistan. All these considerations led the British Cabinet to make a scheme of confederation in India. The proposed constitution would be a three tiered one. At the top there would be the central government of the Union, administering only three important subjects viz. Defence, Foreign Affairs and Communications with powers to raise the necessary finance for the above mentioned subjects. It would have a Legislature and an Executive. The actual constitution of these bodies would be settled by the Constituent Assembly. The Plan, however, imposed one important limitation on the powers of the Union Legislature. While all other matters within the competente of the Union would be decided by a majority votes of all the members, matters involving communal issues would be decided only when the majority of both the major communites gave their consent. This provision was inserted to allay the fears of the muslims, that they might be swamped by the huge Hindu majority. Thus the Union Government, as contemplated by the Cabinet Scheme would be an extremely weak government without any prototype in the world.

All the other powers excepting Defence, Foreign Affairs, and Communication were to remain in the hands of the Province. The

State Paper provided for the formation of groups of Provinces in a particular way. Assam and Bengal were to form one group. The Punjab, Sind and North-west Frontier Province were to form another group. The remaining Provinces were to form a third group. The formation of group was to be decided in the following way. The members of the proposed Constituent Assembly elected from Assam and Bengal would sit together and decide by a majority of votes whether to form a group or not. Similarly with other groups. If the formation of groups was agreed upon, then the members would formulate the constitution of the government of the group and the subjects to be administered by the latter. The members of each section were to decide the constitution of the Provinces within the Group. The Provinces were to administer the subjects not entrusted to the Union or the Group. Each Province would, however, be free to opt out of the group.

The Cabinet Mission also announced its short term plan for setting up at once an Interim Government at the centre in the following terms :

"While the Constitution making proceeds, the administration of India has to be carried on. We attach the greatest importance, therefore, to the setting up at once of an interim Government having the support of the major political parties."[20]

In continuation of the Plan of 16th May, on 16th June 1946, the Viceroy and the Cabinet Delegation jointly issued a statement in which it was mentioned that the two major political parties were finding it difficult to come to an agreement about the formaion of the coalition Government and so they took the initiative in naming the members of the Interim Government which, according to them, should be a strong and representative Government. They, therefore, recommended the names of the following persons.

Sardar Baldev Singh, Sri N.P. Engineer, Mr. Jagjivan Ram, Pandit Jawaharlal Nehru, Mr. M.A. Jinnah, Nawabzada Liaquat Ali Khan, Mr. H.K. Mahatab, Dr. John Mathai, Nawab Mohammad Ismail Khan, Khwaja Sir Nizamuddin, Sardar Abdur Rab Nistar, Mr. C. Rajagopalachari, Dr. Rajendra Prasad and Sri Vallabbhai Patel.

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[20] The Cabinet Mission Plan para 23.

Maulana Abul Kalam Azad wrote a letter to Lord Wavell on June 25, 1946, in which he criticised the attitude of the British in naming the persons for the Interim Government. He wrote :

"One outstanding feature of this list was the non-inclusion of any Nationalist Muslim. We felt that this was a grave omission. We wanted to suggest the name of a Muslim to take the place of one of the Congress names in the list. We felt that no one could possibly object to our changing the name of one of our own men .....Before we could make our suggestion, I received your letter of the 22nd June which surprised us greatly. You had written this letter on the basis of some Press reports. You told us that the Cabinet Mission and you were not prepared to accept a request for the inclusion of a Muslim chosen by the Congress among the representatives of the Congress in the Interim Government. This seems to us an extraordinary decision. It means that the Congress could not freely choose even its own nominees."[21]

He took objection to some of the names mentioned in the list e.g. that of N.P. Engineer, Advocate General of India because of his holding an official position. Then again he mentioned that in place of Mr. Sarat Chandra Bose (whose name was previously suggested by the Congress) that of Mr. Harekrishna Mahtab had been included. He also took objection to the view expressed by Mr. Jinnah and supported by the Viceroy that the Scheduled Castes formed a minority and did not belong to the Hindu community. So on behalf of the Congress Working Committee, Maulana Abul Kalam Azad refused to accept the Joint proposal of the Viceroy and the Cabinet Mission for the formation of a Provisional Government.

The Congress Working Committee also passed a Resolution on June 26th 1946, in which they mentioned the artificial and unjust parity mentioned in the Statement of June 16th. They expressed their disapproval to this provision as this would give the power of veto to a communal group. So they refused to accept the proposal for the formation of an Interim Government as proposed in the statement of June 16th. They expressed at the same time their willingness to join the proposed Constituent Assembly for the

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[21] Extract from the letter of Maulana Abul Kalam Azad to Lord Wavell, dated June 25, 1946.

formation of the Constitution of a free, united and democratic India and wanted that a representative and responsible Provisional National Government should be formed at the earliest opportunity.

What happened after this was an accident which like so many other accidental occurences, changed the course of the Indian Constitutional history. On 10th July 1946, Jawaharlal, the then President of the Congress, held a Press Conference in which he was asked by the Press Representatives as to whether the Congress accepted the Cabinet Mission Plan in toto and if they retained the right to modify the Cabinet Mission Plan. "Jawaharlal replied emphatically that the Congress had agreed only to participate in the Constituent Assembly and regarded itself free to change or modify the Cabinet Mission Plan as it thought best."[22]

The Muslim League had accepted the Plan as a whole. "In his speech to the League Council, Mr. Jinnah had clearly stated that he recommended acceptance only because nothing better could be obtained."[23]

The Muslim League said that the Plan was accepted by them under the impression that Congress also had accepted it in toto. Now that the Congress expressed through its President that it had only agreed to enter the Constituent Assembly and was free to change the terms of the Plan, that meant that the members of the Congress were taking advantage of their majority and the minority would be at their mercy. The League could not agree to such terms and as such rejected its acceptance of the Cabinet Mission Scheme.

Maulana Azad asserts what Jawaharlal said was not the view of the Congress. But if it was said in plain terms, that would compromise the honour of the Congress President. So a Resolution was drafted by the Working Committee of the Congress in which no mention was made of the Press Conference but it contained assertions which were contrary to the statement of Jawaharlal. It was said :—

"The Committee have emphasised the sovereign character of the Constituent Assembly, that is its right to function and draw up a Constitution for India without the interference of any external power or authority. But the Assembly will naturally

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22 Azad Aaulana Abul Kalam : *Op. cit.*, p. 155.
23 *Ibid.*, p. 155.

function within the internal limitations which are inherent in its task and will therefore seek the largest measure of co-operation in drawing up a Constitution of free India allowing the greatest measure of freedom and protection for all just claims and interest. It was with this object and with the desire to function in the Constituent Assembly and make it a success, that the Working Committee passed their resolution on June 26, 1946 which was subsequently ratified by the All India Congress Committee on July 7, 1946. By that decision of the A.I.C.C. they must stand and they propose to proceed accordingly with their work in the Constituent Assembly."[24]

But this Resolution of the Working Committee could not reassure the Muslim League and the rejection of the scheme by the League was maintained. On 12th August Jawaharlal was invited by the Viceroy to form an interim government. The League Council met at the end of July and passed a resolution of Direct Action. In the meantime the Interim Government was formed by Lord Wavell and Pandit Nehru. After the bloodbath of the Direct Action in August, 1946, Lord Wavell invited the League to mention five names for the Interim Government of fourteen. But the League refused. So the Interim Government with Pandit Nehru as the Vice-President took office on September 2. It was composed of 12 members 5 Caste Hindus (Congress), 3 Muslims (1 Congress, 2 non-Congress, non-League), 1 Scheduled Caste Hindu (Congress), 1 Sikh (Akali Party), I Indian Christian (Non Congress) and 1 Parsee (Non-Congress). But the Viceroy persuaded Mr. Jinnah to allow the League members to join the Interim Government. At last on 26th October 1946, five of Nehru's colleagues had to resign in order to make room for the League members.

As the Interim Government was formed, it was no longer possible to withhold the formation of the Constituent Assembly. So election to the Constituent Assembly was held and the Muslim League participated in the election. Some Muslim League candidates were also returned. But difference of opinion arose between the Congress and the League with regard to the grouping clause .of the Cabinet Mission Plan. Compulsory grouping was in the interest of the Muslim League for it was a half way

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[24] Azad Maulana Abul Kalam : *Op. cit.*, p. 157.

house to Pakistan but Congress objected to it. The British Government as usual supported the Muslim League and declared :—

"Should a Constitution come to be framed by the Constituent Assembly in which a large section of the Indian population had not been represented, His Majesty's Government would not contemplate forcing such a Constitution upon any unwilling part of the country."[25]

Thus while the Cabinet Mission Plan envisaged a Union in division the above mentioned statement clearly pointed out towards the possibility of two States and two Constituent Assemblies. So the Muslim League did not join either the first session of the Constituent Assembly on 9th December 1946 nor the plenary session held in next January.

In February 1947, the British Premier announced that the British were leaving India on June 1948.

"His Majesty's Government desire," said the statement "to hand over responsibilities to authorities established by a Constitution approved by all parties in India in accordance with the Cabinet Mission Plan but unfortunately there is at present no clear prospect that such a Constitution and such authorities will emerge. The present state of uncertainty is fraught with danger and cannot be indefinitely prolonged. His Majesty's Government wish to make it clear that it is their definite intention to take necessary steps to effect the transference of power to responsible Indian hands at a date not later than June."[26]

Now what led the British Premier to announce suddenly a date for the withdrawal of the British ? When the League agreed to join the interim Government, Lord Wavell wanted one of the important portfolios to go to the League. His idea was that the Home Department should be given to the League but Sardar Patel who was then holding it objected. At the suggestion of Rafi Ahmed Kidwai, it was proposed to give finance to the League. Maulana Azad did not like the idea because finance, he thought, would give the key position to the League. But as he points out in *India Wins Freedom,* he had to submit to the decision of others, and Liaquat Ali became the Finance member. Soon it was under-

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[25] Statement published by the British Government on the 6th December, 1946.

[26] Announcement by the British Premier on the 20th February, 1947.

stood that Congress had made a mistake in offering this portfalio to the Muslim League. Liaquat Ali rejected or modified every proposal made by other members. "His persistent interference made it difficult for any Congress Member to function effectively. Internal dissensions broke out within the Government and went on increasing."[27] As the five League members refused to co-operate with the other members of the Interim Government, the result was that it degenerated from the position it attained as a virtual Cabinet.

"Mahatma Gandhi suspected that the League might have entered the Interim Government to fight. Within three weeks of the League's entry into the Interim Government, Pandit Nehru publicly complained against his League colleagues."[28]

Maulana Azad also writes,..... "the League Members of the Executive Council were thwarting us at every step. They were in the Government and yet against it. Infact they were in a position to sabotage every move we took. The powers of the Finance Member were being stretched to the limit and a new shock awaited us when the Budget for the following year was presented by Liaquat Ali."[29]

The Congress was for removing economic inequality and doing away with the capitalist society. But the idea was to bring about the socialist society by evolution. Now the budget framed by Liaquat Ali, though ostensibly based on Congress declaration, shocked everybody. It was found on scrutiny that the budget was framed with a communal bias.

"Liaquat Ali's proposals took some of our colleagues by complete surprise. There were some who were secretly in sympathy with the industrialists. There were others who honestly felt that Liaquat Ali's specific proposals were based on political and not on economic considerations. Sardar Patel and Sri Rajagopalachari in particular were violently opposed to his budget, for they felt that Liaquat Ali was more concerned to harass industrialists and businessmen than to serve the interests of the country. They

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[27] Azad Maulana Abul Kalam : *Op. cit.*, pp. 167-168.
[28] Banerjee A. C. and Bose D. R.: The Cabinet Mission in India : Introduction.
[29] Azad Maulana Abul Kalam : *Op. cit.*\ p. 175.

thought that his main motive was to harm the members of the business community, the majority of whom were Hindus."[30]

The situation thus became a difficult one. The League had once accepted the Cabinet Mission Plan but had rejected it later on. There was no solution of the communal problem. Even in the Interim Government, the communal dissension manifested itself at every step. The Constituent Assembly was holding its sessions but the League had boycotted it.

A situation had arisen which needed some immediate action and the Labour Government in Britian felt it necessary to announce a date for the withdrawal of the British from India. There was a feeling in India during the long period beginning from the Montagu-Chelmsford Reforms upto the end of the Second World War, that the British did not really want to transfer power to the Indian hands and they were shirking the issue. The Labour Government in Britain was determined to remove this stigma. The disturbances in India left either of the two courses open to the British—either to concentrate all their forces in India and rule with an iron hand or to fix the date for their withdrawal from India. Now the British had to mind their business at home also. The manpower in Britain was reduced by the devastation of war and post-war reconstruction demanded a great part of the attention of the British Government. So inspite of the contrary opinion of Lord Wavell, the then Viceroy of India, in February 1947, the British Premier announced that the British were leaving India by June 1948.

It was also declared that if a Constitution based on the Cabinet Mission Plan was not worked out by a fully representative Constituent Assembly by June 1948, His Majesty's Government would have to consider to whom power of the Central Government in British India should be handed over on the due date, whether as a whole to some form of Central Government for British India, or in some areas to the existing provincial Governments, or in such other way as may seem most reasonable and in the best interests of the Indian people.

Lord Wavell wanted that the communal issue should be decided before the British would leave India and he also wanted

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[30] *Ibid.*, p. 176.

to stick to the Cabinet Mission Plan. When he found that he failed to convince Mr. Atlee, he tendered his resignation and Lord Mountbatten was appointed in his place. He came to India with instructions from Mr. Atlee that power must be transferred before 30th June 1948. The situation which Mountbatten had to face in India was an unenviable one. There was a deadlock in the Central Government due to the dissension between the Congress and the Muslim League. Communal passions were rising everyday. Riots in Calcutta were followed by riots in Noakhali and Bihar.

Lord Mountbatten was required by his 'directive' to find an agreed solution for a United India on the basis of the Cabinet Mission Plan. But as days went by, he found that it was impossible to reach an agreed solution. So he drew an alternative plan. The plan provided that power would be transferred for the time being to the provinces or such confederation of provinces as might group themselves together. Then the members of the Legislative Assemblies of Bengal and the Punjab should meet separately in two parts and if both sections of each of the Assemblies voted for partition, the provinces would be partitioned. The Viceroy put this plan before a Conference of Governors on 15th and 16th April. The Governors expressed their doubts about the successful carrying out of the plan. As Alan Campbell Johnson writes, "Jenkins gave a lucid analysis of the implications of Punjb partition, showing just how the Moslem versus non-Moslem issue was complicated by Sikh and Hindu Jat claims. Tyson similarly examined the prospects for Bengal, if under partition. East Bengal, he felt, would become a rural slum. There were some twenty-five million Hindus in Bengal-forty-five per cent of the population and they all wanted to be absorbed into Hindustan. The concept of East Bengal was unacceptable to many local Moslems."[31]

"In the face of the progressive deteriorating situation in the country, Lord Mountbatten felt that if the procedure for the transfer of power was not finalised quickly, there was a possibility that at least in some parts of the country, there would be no authority to whom power could be transferred."[32]

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[31] Cambell-Johnson Allan : Mission with Mountbatten, p. 65.
[32] Menon V. P.: Transfer of Power in India, p. 357.

So he revised his original plan according to his discussion with the Governors and party leaders and sent this new revised plan to London on 2 May.

"Nehru explained his reaction to the scheme. He said that it was very desirable that there should be a transfer of power as soon as possible on a Dominion Status basis. He added that the basic reason for wanting an early transfer of power, apart from the desire of the Indians to control their own affairs, was that developments in India would not otherwise take place as they should. The present system of frequent reference to His Majesty's Government was producing the psychology of always looking elsewhere for decisions ; of continual bidding by the different parties ; of a lack of reality, and of an absence of self-reliance."[33]

The Viceroy now received from London the plan which he had sent there. It was finalised and approved by the British Cabinet. On 10th May Mountbatten showed the plan to Nehru and "Nehru having read it...vehemently turned it down."[34]

His main objection was that upto the time of the statement of 20th February, the approach had been on the basis of a United India but the draft plan encouraged units to cut adrift. Nehru now sent a note to Lord Mountbatten in which he summarised his reactions to His Majesty's plan. "Instead of producing any sense of certainty, security and stability, they would encourage disruptive tendencies everywhere and chaos and weakness. They would particularly endanger the important strategic areas. In these proposals the whole approach has been changed completely. Starting with the rejection of an Indian Union as the successor to power, they invited the claims of large number of successor States who would be permitted to unite if they so wished into two or more States. Nehru had no doubt that a pronouncement by His Majesty's Government on the lines proposed would provoke wide and deep resentment all over India."[35]

Mountbatten informed the Secretary of State of the development in Simla and communicated to him the outline of an alternative plan. On 14th May he returned from Simla to Delhi and received an invitation from the Prime Minister to go to London. Before

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33 *Ibid.*, p. 360.
34 Campbell-Johnson Allan : *Op. cit.*, p. 89.
35 Menon V. P. : *Op. Cit.*, p. 362.

his departure on 16th May he drew up a draft Heads of Agreements which were as follows :

In the event of it being decided that power should be transferred to one Central authority and one only, it would be transferred to the existing Constituent Assembly on a Dominion Status basis. If it was decided that there would be two sovereign States in India, the Central Government of each state should take over power in responsibility to their respective Constituent Assemblies, on a Dominion Status basis. In case of two Dominions coming into being, the Governor-General would be the same, the Armed Forces in India should be divided between the two and a boundary Commission should be appointed for the demarcation of boundaries.[36]

When the Viceroy wanted the leaders to comply with it in writing, Nehru readily did so but Jinnah and Liaquat Ali (who were consulted by the Viceroy on behalf of the Muslim League) though willing to accept the general principles of the plan, refused to state their acceptance in writing.

On 18th May the Viceroy left for London and the new plan was approved and finalised by the Cabinet. "After expressing full sympathy with the desire of the major political parties for the earliest possible transfer of power, the statement announced that His Majesty's Government was willing to hand over even earlier than June 1948. Accordingly it proposed to introduce legislation during the current session of Parliament for the transfer of power in 1947 on a Dominion Status basis to one or two successor authorities according to the decisions taken under the plan."[37]

On 2nd June a Conference was held between the Viceroy and the party leaders. During this Conference, the Viceroy said that "before he left for India in March, he had been given no indication of the necessity for speed in formulating proposals for the transfer of power. He had been led to believe in London, that if his recommendations were submitted so as to enable legislation to be introduced in Parliament by the beginning of 1948, that would be time enough. But from the moment of his

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[36] *Ibid.*, p. 366.
[37] Menon V. P.: *Op. cit.* p. 370

arrival in India a terrible sense of urgency had been impressed upon him by everybody to whom he had spoken. They wanted the present state of politiacl uncertainty to cease. He had come to realize that the sooner power was transferred, the better it would be."[38]

On 3rd June the plan which Mountbatten had brought from London was announced. In it a reference was made to the fact that while the Hindu majority provinces had already made a considerable progress in the task of evolving a new Constitution, the Muslim majority provinces had decided not to participate in the Constituent Assembly. Then it mentioned that any Constitution made by the Constituent Assembly could not be applied to those parts of the country which were unwilling. So in order to know the wishes of the people, that is, whether they wanted their Constitution to be framed by the existing Constituent Assembly or in a new and separate Constituent Assembly, the following method was suggested :—

The Provincial Legislative Assemblies of Bengal and the Punjab would each be asked to meet in two separate parts, one representing the Muslim majority parts and the other representing the Hindu-majority parts. The members sitting separately would vote and decide by simple majority whether the Province should be partitioned or not. If they decided that there should be partition, arrangement would be made accordingly.

Lord Mountbatten addressed a press conference on 4th June. In it he made it clear that the transfer of power would be in 1947 and not in June 1948. He said, "I think the transfer could be about the 15th of August."[39]

The Council of the All India Muslim League met in New Delhi on 10th June. Though they were opposed to the partition of Bengal and the Punjab, on the whole they expressed satisfaction that the Cabinet Mission Plan was abandoned and gave full authority to Mr. Jinnah to accept the fundamental principles of the plan.

The All India Congress Committee met in Delhi on 14th and after a long debate accepted the June 3rd plan.

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[38] *Ibid.* p. 372.
[39] Quoted in Menon V.P.: *Op. cit.* p. 382.

It had been laid down by the Plan that division of India was a matter to be decided by the Indian people. Thus East Bengal, West Punjab, Sind, Beluchistan and the North West Frontier Province voted for Pakistan.

The Indian Independence Bill was passed by the House of Commons on 15th July and by the House of Lords on 16th July. The Bill received Royal assent on 18th July. The Government of India Act of 1935 in a modified form was adopted by the India (Provisional Constitution) Order 1947. India thus became independent on 15th August, 1947.

Maulana Azad was all along opposed to the division of the country and in *India Wins Freedom,* he has strongly spoken against Pakistan. In fact being a Nationalist Muslim, it was in the fitness of things that he should stand for a united India. What he says has some logical foundation. If Congress really thought that there was only one nation in India, how could it agree to Pakistan ? Was it not a tacit acceptance of the two-nation theory ? So "the most crest-fallen was the small but dedicated band of nationalist Muslims who felt betrayed."[40]

But Congress had accepted Partition as a necessary evil. Azad himself mentions the fact that Liaquat Ali as Finance Minister was giving trouble to all the Departments of the Interim Government. As Sardar Patel was responsible for giving the portfolio of Finance to the League, and as he was being hampered by Liaquat Ali in his work as Home Minister, when the plan of Partition was suggested, he agreed to it. In the A.I.C.C. session of 14-15 June 1947 also, "it was Patel who delivered the Keynote address. He used the analogy of a diseased body and argued that if one limb was poisoned, it must be removed quickly lest the entire organism suffer irreparably."[41]

From the logical point of view, it seems to be wrong that Congress which spoke of one nationality in India should accept Partition. Maulana Azad takes this to mean that Congress accepted the two-nation theory. In that case where would the Nationalist Muslims stand ? But if we probe deeper into the facts, we will be sure that acceptance of Partition by the Congress

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[40] Brecher Michael : Nehru, A Political Biography, p. 349.
[41] Brechar Michael : *Op. cit.* p. 349.

did not mean acceptance of the two-nation theory. Congress was opposed to Partition but when the Muslim League was adamant it was thought that "The alternative was civil war, a logical by-product of the communal riots and the dangerous friction within the interim Government."[42]

This view was expressed by V. P. Menon to Sardar Patel before Mountbatten reached India. Though at that time Menon submitted this view to the India office in London, no one took any notice of it. But later on this became the attitude of the whole Congress and Congress accepted Partition as a necessary evil. This was why before the Conference of 3rd June, when Mountbatten showed his plan to Nehru, he objected to it.

"Nehru was determined to establish the claim that the proposed Union of India was the rightful successor to the British Raj and that Pakistan was merely the secession of a few provinces from British India."[43]

So the Congress in accepting Partition was not accepting the two-nation theory. That is to say, they were not believing in the idea that India was for Hindus only and Pakistan for Muslims. On the contrary the idea was that Pakistan was for muslims (for that section of it who wanted to go and stay there) and India for the rest of the Indians, including Muslims. So nationalist Muslims had no ground to feel it as an anomaly.

The Indian Independence Act did not frame any Constitution but gave unlimited power to the Indian Constituent Assembly to frame the Constitution of India. It was understood that the Constituent Assembly which held its first meeting on 9th December 1946 was to be the Constituent Assembly of India and Pakistan was to have a new Constitution-making machinery for herself. The former re-assembled on 14th August 1947 at the Sovereign Constituent Assembly for India.

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[42] Quoted in Brecher Michael : *Op. cit.* p. 346.
[43] Brecher Michael : *Op. cit.* pp. 345-346.

CHAPTER VII | THE INDIAN STATES

Before India achieved independence, she had two problem children—one was the Muslim League and the other was the autocratic Indian States. It is a well known fact that the main reason for which the federal portion of the Government of India Act 1935 could not be implemented was the backing out of some of the States which feared a financial loss from federal union. The Cabinet Mission Plan contained the following provision with regard to the States,

"It is quite clear that with the attainment of independence of British India, whether inside or outside the British Commonwealth, the relationship which has hitherto existed between the rulers of the States and the British Crown will no longer be possible. Paramountcy can neither be retained by the British Crown nor transferred to the new Government. This fact has been fully recognised by those whom we interviewed from the States. They have at the same time assured us that the States are ready and willing to co-operate in the new development of India. The precise form which their co-operation will take must be a matter for negotiation during the building up of a new constitutional structure."[1]

On 10th June 1946, at a meeting in Bombay, the Standing Committee of the Chamber of Princes accepted the Viceroy's invitation to set up a negotiating committee as envisaged in the Cabinet Mission proposal.

The Indian Constituent Assembly passed a resolution on 21st December appointing a negotiating committee to negotiate with a similar body which was already appointed by the Princes, to deal with the representation of the States in the Constituent Assembly. The negotiating Committee of the States had one defect. It represented the Princes and not the people of the states.

When the Constituent Assembly was set up, it had 93 seats allotted to the states. On the question of filling up these seats,

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[1] The Cabinet Mission Scheme. Para 14.

the states had difference of opinion among themselves. A lengthy resolution was passed and adopted at a Conference of rulers held in Bombay on 29th January 1947. It laid down certain conditions as preliminary to the participation of the States in the Constituent Assembly. The conditions were the following :—

(a) The entry of the states would depend upon negotiation.

(b) They might discuss upon constitutional matters in the meantime but that would not mean any commitment with regard to their ultimate decision.

(c) All powers and subjects would be retained by the states except those ceded to the Union.

(d) Paramountcy exercised by the British Crown would not be transferred to the new Government in India.

(e) These states would have full control over their constitution, their reigning dynasty, and territorial integrity.

After this there were two groups among the states. One group, led by the Nawab of Bhopal, said that the Negotiating Committee of the states was the only body competent to carry on preliminary negotiation on behalf of the states. They threatened to boycott the Constituent Assembly if their terms were not accepted.

A note of dissent was, however, sounded by a small group. On 8th February 1947, Baroda negotiated directly with the Negotiating Committee of the Constituent Assembly and joined the latter. Earlier the Maharaja of Cochin announced his intention to participate in the Constituent Assembly. But the majority of the states clung to the Negotiating Committee of the states. So Shree Nehru gave them assurance about the monarchical form of government and also aobut their territorial integrity though at the same time he mentioned that the British Indian representatives of the Constituent Assembly disapproved autocracy. This statement by Nehru paved the way for the entrance by the States representatives to fill the 93 seats alloted to them in the Constituent Assembly. The Maharaja of Bikaner and Patiala were the first to decide about sending representatives

to the Constituent Assembly. On 28th April, 1947 the following State's representatives took their seats in the Constituent Assembly—Baroda, Bikaner, Cochin, Jaipur, Jodhpur, Patiala and Rewa. After this the representatives of many other States came and joined the Constituent Assembly.

On 13th June at a meeting between Lord Mountbatten and the party leaders, it was decided to set up a new Department called the State Department, entitled to deal with matters of common concern, and divided into two sections, ready for the partition of the country. On 27th June, the State Department was set up. It had two ministers, Sardar Vallabhbhai Patel and Abdur Rab Nistar, the latter being appointed at the suggestion of Mr. Jinnah. On 5th July, V. P. Menon took charge as Secretary of the Department.

Clause 7 of the Indian Independence Bill was of special interest to the States in as much as it mentioned that the suzerainty of His Majesty over the Indian States with all power, authority and jurisdiction which flowed from it would lapse after the appointed date. A later revised version of the Bill included the provision that all treaties and agreements which existed between His Majesty and the Rulers of the Indian States would lapse. The Congress presented two criticisms to this clause. First of all, it did not make any provision for the accession of the States and secondly they wanted a Standstill clause to be included in the Bill to the effect "Until new arrangements are completed, the existing relations and arrangements between His Majesty's Government and any Indian ruler in all matters of common concern should continue as between the two Dominion Governments and the State concerned."[2]

The Secretary of State presented a counter argument to the effect that Parliamentary legislation could not place any obligation upon the Indian States to continue the treaties and agreements which were entered into under Paramountcy.

But the Viceroy pointed out the danger of sudden lapse of all treaties and agreements. Thus the Secretary of State agreed to insert the following proviso at the end of class 7 : "Provided

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[2] Congress suggestion for Standstill Clause referred to in Menon, V. P. The story of the Integration of the Indian States, p. 105.

that notwishtanding anyting in paragraph (b) or paragraph (c) of this sub-section, effect shall, as nearly as may be, continue to be given to the provisions of any such agreement as is therein referred to which relate to customs, transit and communications, posts and telegraphs or other alike matters, until the provisions in question are denounced by the Ruler of the Indian State or person having authority in the tribal areas on the one hand or by the Dominion or Province or other part thereof concerned on the other hand, or are suspended by subsequent agreements."[3]

With regard to the accession of States also a new sub-clause was added at the end of clause 2. "Nothing in this section shall be construed as preventing the accession of Indian States to either of the new Dominions."[4]

So the Indian Independence Bill had, on the whole, four provisions with regard to the States :—

(a) The lapse of Paramountcy.

(b) The lapse of treaties and agreements between the British Crown and the Indian States.

(c) Continuance of the same between the Indian Dominions and the States by mutual agreements under a Stand still Clause.

(d) Provision for accession of the States.

The Instrument of Accession provided for the accession on there subjects Viz. Defence, External Affairs, and Communication, their content being the same as defined in List I of Schedule 7 to the Government of India Act 1935. Accession did not imply any financial obligation on the part of the acceding States. But accession on three subjects only was by no means satisfactory and it had many critics but it at least saved India from the chaos and confusion which would have followed the lapse of Paramountcy. Accession on Defence was also an asset on the part of India as it would give India the power to enter any State which acceeded in order to supress any internal disturbance.

Travancore was planning to assert its independence after the transfer of power but the Maharaja was persuaded by Lord

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[3] Indian Independence Bill, Clause 7.
[4] Indian Independence Bill, Clause 2.

Mountbatten and V. P. Menon to accede to India. Then Jodhpur, whose Maharaja was leaning towards accession to Pakistan, was persuaded to accede to India. Then came the Nawab of Bhopal, the Maharaja of Indore, the rulers of Dholepur, Bharatpur, Bilaspur and Nabha. Thus by 15th August almost all the States contiguous to India had acceded. The only exceptions were Junagadh, two small states in the Kathiwar, Hyderabad and Kashmir.

Junagadh was the Premier State among the group of Kathiawar States. The government of Junagadh announced its accession to Pakistan. The rulers of the other States in Kathiawar protested against this in one voice. Infact this would have lead to the disruption of Kathiwar. Geographical contiguity and wishes of the people also pointed out towards the accession of Junagadh to India. In order to protect the smaller States around Junagadh, Indian army was stationed in those States. The Kathiwar Congress leaders set up a parallel Government there—a provisional Government called the Arzi Hukumat. The people of Junagadh issued a written proclamation to the effect that the Nawab had forfeited their allegiance. At this time traders refused to have business with Junagadh, food situation within the State detoriated and the Arzi Hukumat occupied various parts of the State. The Junagadh State Council decided on 5th November that the economic blocade, the inter-statal complication and the internal administrative difficulties made it imperative to have re-orientation of the State policy and it might be necessary to have a reversal of the earlier decision to accede to Pakistan.

On 9th November, the administration of Junagadh was handed over to India. The Nawab of Junagadh, who had taken flight to Pakistan, opened negotiation with the High Commissioner of India in Pakistan to the effect that if he were allowed to return to Junagadh, he would be prepared to accede to India. The wishes of the people were ascertained by a referendum in which an overwhelming number opted for accession to India. It was decided by seven men elected by Junagadh that it should be integrated with the Union of Saurashtra. The administration of the State was handed over to Saurashtra on 20th February, 1949.

The Orissa States, 26 in number were amalgamated with the Province of Orissa, on 13th December. On 15th December, Sardar and Menon met the Rulers of the Chattisgarh States and appealed to them to sign the merger agreement. The principle followed in the merger of States was explained by Sardar in a Statement issued from Delhi on 16th December.

"The statement laid stress on the fact that democracy and democratic institutions could function efficiently only where the unit to which these were applied could subsist in a fairly autonomous existence. Integration was clearly and unmistakably indicated where, on account of its smallness of size, its isolation, its inseparable link with a neighbouring autonomous territory in practically all matters of everyday life, its inadequacy of resources to open up its economic potentialities, the backwardness of its people and its sheer incapacity to shoulder a self-contained administration, a State was unable to afford a modern system of government."[5]

On 23rd December 1947, the Government of India delegated to Orissa the power to administer the Orissa States, subject, of course, to the control of the Government of India. The Central functions were reserved to the Government of India. On the 17th October Mayurbhanj, the remaining Orissa State signed the Instrument of Accession and on 9th November the Government of India appointed a Chief Commissioner to administer it.

The history of the union of Saurashtra is also interesting. Following the transfer of power, there was agitation in all the States of Saurashtra for responsible Government. In the past the rulers of the smaller States particularly depended much on the help of the British. Now that support was gone and the States Department felt that in order to prevent the unhealthy effect of popular agitation on the law and order of the country, the best solution was to amalgamate all the States into one Union. On 17th January, Mr. Menon addressed the rulers of the salute States. Some extracts from it are important from our point of view :

"In order to keep the country together after the lapse of paramountcy," said he, "the rulers of the States patriotically

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[5] Menon V. P. : *Op. cit.* p. 170.

accepted accession to the Dominion of India on three essential subjects of defence, foreign affairs, and communications. This in itself was not a final solution from the point of view of either of the States or of the Dominion. But it helped to secure in some measure that integrity of India which had in the past been accomplished by paramountcy. Paramountcy had meant the internal as well as the external security of the States, so that the Princes had been shielded, so to say, from the political aspirations and ambitions of the people. They were now brought face to face for the first time with their people, and many of them were not prepared for the change. It has also to be remembered that the new Government which has taken over at the Centre is a people's Government and one could expect the Government of India to have a predisposition in favour of the people's rights, just as under the old system the paramount power might have had a bias in favour of the rights of the rulers when they conflicted with the interests of the people. . . . what the Government of India would like is a peaceful transfer of power to the people without any kind of violence to the princely order."[6]

That some of the rulers were ready to grant responsible government to their people was no solution because most of the States were too small to be viable administrative units. The rulers after some consultation among themselves communicated to Mr. Menon their unanimous decision to agree to the principle of a united Kathiwar. In a supplementary covenant which the rulers signed in November 1948, the united States of Kathiwar was renamed as the united States of Saurashtra.

The States in Bombay, on account of their geographical situation could be divided into two groups—Baroda and the Gujrat States in the North and the Deccan States in the south. The Deccan States planned to have a union and a covenant was drafted to that effect but there were agitations in some of the States for merger with Bombay. At its very first meeting on 26th January 1948, the Constituent Assembly for the United Deccan States passed a resolution of merger with Bombay. As the Deccan Union had not formally been inaugurated, the States had to merge individually. The Rulers of the Deccan States at a meeting

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[6] Menon V. P.: *Op. cit.* p. 183.

called at Bombay on 19th February 1948 signed the merger agreements.

The Rulers of the Gujrat States wanted to form a union with Baroda. But Mr. Menon made it clear that the only possible course for them was merger with the Bombay Province. The Ruler of Baroda also rejected their proposal for the formation of a Union of Gujrat States with Baroda and Gujrat States decided to take the step advised by Mr. Menon. By February 1949 all the Gujrat States signed their merger agreement.

The Vindhya Pradesh, which comprised of Bundelkhand and Bhagelkhand—the two territorial divisions, was formed into a Union on 13th March but as corruption was rempant among the newly formed ministry, they were asked to resign, which they did on 14th April 1949. On 1st January 1950, the Government of India took Vindhya Pradesh as a centrally administered area. It was placed under a lieutenant Governor.

There were many small states scattered throughout Central India, the only two big States among them being Gwalior and Indore. It was with great difficulty that they were persuaded to come within one Union. In the States' Ministry's office the Draft Covenant was discussed. The covenant is interesting from our point of view in as much as there was a new approach in it towards the relation between the Centre and the States. Immediately before the transfer of power, the States, big and small, had acceded on three subjects—Defence, Communication and External Affairs. The relationship was so long confined to these three subjects. Now the biggest Union was going to be created and it was felt that there was no reason why it should be treated separately from the Provinces, specially when there was so much to be done for the improvement of the social and labour conditions of the Unions. Unless and until the Dominion Legislature was given the same power over the Unions as it had over the Provinces, it could not do anything towards the improvement of the Unions. So a mandatory provision was included in the Covenant of Madhya Bharat in the following terms :

"The Rajpramukh shall, as soon as practicable and in any event not later than the fifteenth day of June 1948, execute on behalf of the United States, an Instrument of Accession in accordance with the provisions of section 6 of the Government

of India Act 1935 and in place of the Instruments of Accessions of the several covenanting States ; and he shall by such Instrument accept as matters with respect to which the Dominion Legislature may make laws for the United State all the matters mentioned in list 1 and list 3 of the Seventh Schedule to the said Act, except the entries in list 1 relating to any tax or duty."[7]

Mr. Gopalaswami Ayyangar, who was then the Minister of Transport said that this provision revolutionised the entire relationship between the Centre and the States. This article was later applied to other Unions by supplementary covenants.

After this the Patiala and East Punjab Union was formed by swearing in the Rajpramukh on 15th July 1948 and a ministry was set up early in 1949. The Rajasthan Union was formed in five different stages. At first the Matsya Union was formed. The second stage was the formation of the first Rajasthan Union with Banswara, Bundi, Dungarpur, Jhalawar, Kisengarh, Kotah, Partabgarh, Shahpura and Tonk. The third stage was the inclusion of Udaipur in the first Rajasthan Union. The fourth stage was the creation of greater Rajasthan by the inclusion of the Rajput States of Jaipur, Jodhpur, Bikaner, and Jaisalmer and the fifth stage was the incorporation of the Matsya Union in Greater Rajasthan. When the Maharana of Udaipur gave his consent for joining the Union, the Draft Covenant was discussed by the rulers on 10th April in Delhi. In the Covenant of Saurashtra, Matsya and Vindhya Pradesh Union, the Rajpramukh had executed a fresh Instrument of Accession acceding on the three subjects of Defence, External Affairs and Communication. In Covenant of the second Rajasthan Union there was a permissive provision enabling the Rajpramukh to surrender all the subjects from the federal and the concurrent list for legislation by the Dominion Legislature. When the Madhya Bharat Union was formed, as it has been already mentioned, a provision in the Covenant made it obligatory for the Rajpramukh to accept all the subjects in both the federal and concurrent legislative lists for legislation by the Dominion Parliament. The final Rajasthan covenant included a mandatory provision as in the case of Madhya Bharat, accepting all the subjects in the federal and concurrent legislative lists as subject

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[7] Menon, V. P.: *Op. cit.* pp. 236-237.

for legislation by the Dominion Parliament excepting the entries relating to taxation and duties.

The Union of Travancore-Cochin was inaugurated on 1st July 1949. By the covenant, the United States of Travancore and Cochin acceded on all subjects in the federal and concurrent lists.

The process of transition by which Mysore became an integral part of the Indian Union was smooth and easy. In August 1947 the Maharaja executed both the Instrument of Accession and the Standstill Agreement. In June 1949, he executed a revised Instrument of Accession giving the Central Legislature power to legislate on all matters in the federal and concurrent legislative lists, except those relating to duties and taxation. Subsequently Mysore also accepted the scheme of Federal Financial Integration, which came into operation on 1st April, 1950.

"By a proclamation of 29th October 1947, the Maharaja had set-up a Constituent Assembly to frame a constitution for the State ; this Constituent Assembly passed a resolution recommending that constitution framed by the Constituent Assembly of the Indian Union should be adopted by Mysore."[8]

Immediately after the announcement of His Majesty's Government's Plan of June 3 1947, the Nizam of Hyderabad was planning to declare himself to be an independent ruler and with this intention, he did not send any representatives to the Constituent Assembly but Lord Mountbatten told the delegation sent by the Nizam that His Majesty's Government would never recognise Hyderabad to be a member of the British Commonwealth except through either of the two Dominions.

Both Lord Mountbatten and Mr. Menon requested the Nizam to accede on three subjects without any financial commitment but the general feeling of the delegation was that the Nizam would never agree to do so as it would compromise his sovereignty. In subsequent meetings with Mr. Menon, the Hyderabad delegation pressed for permission to negotiate a Standstill Agreement without executing the Instrument of Accession. But Mr. Menon told them that the Government of India did not contemplate this

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[8] Menon, V. P.: *Op. cit.* p. 295.

peculiar situations of a non-acceding State executing a Standstill Agreement. Then a request came from Hyderabad to change the expression Instrument of Accession into Articles of Association but Sardar refused to grant the slightest change for that, according to him, would be unjust to the other States which had acceded. At the same time he agreed to abide by the decision of the people if the matter was referred to them by referendum.

Mr. Menon, however, persuaded Sardar and Shree Nehru to treat the case of Hydorabad as a special one and allow the Nizam to sign a Standstill Agreement, which would include the substance of accession. The draft was prepared and approved by Lord Mountabatten, Sardar Vallabhbhai Patel and Shree Nehru. The executive committee of the Nizam also advised him to accept it but by this time, the Nizam had come under the influence of a communal organisation called Ittehad-Ul-Muslimeen. Its leader Razvi was advising the Nizam not to sign the agreement. It was very difficult to arrive at a solution of the Hyderabad problem. While India was thinking in terms of accession of Hydrabad, the Nizam wanted a treaty. So the two parties started poles asunder. The fact was that the Nizam by the advice of Razvi, was making light of the power of India specially because the tribal attack of Kashmir had begun in October. The reason for India's demand of the accession of Hyderabad to India was explained by Mr. Menon to a delegation from Hyderabad. He said that the majority of the population of Hyderabad were Hindus. If in this circumstance Hyderbad did not accede to India, the Hindus naturally would have a feeling that their fate was decided by the Muslim minority in Hyderabad. At last after several more flights of the Hyderabad delegation to and from Delhi, the Standstill Agreement was signed by the Nizam on 29th November 1947. In the preamble there was a promise of mutual amity and co-operation. The first Article said that all the administrative arrangements which existed between the Crown and the Nizam before Independence with regard to Defence, External Affairs and Communication would be continued between the Nizam and the Government of India but Article 3 stressed that the India Government would not exercise any paramountcy power. In the collateral letter, the Nizam said that he was not in any way prejudicing his sovereignty. In his reply

Lord Mountbatten said that he expected this Standstill Agreement to pave the way for a satisfactory long-term solution.

Soon after this the terms of the Standstill Agreement were broken by the Nizam one by one. Two ordinances were issued one to restrict the import of precious metals from India to Hyderabad and the other to declare that Indian currency would not be legal tender in Hyderabad. Moreover Hyderabad advanced a loan to Pakistan and installed a diplomatic agent in Pakistan. It was pointed out to Hyderabad by the States ministry that the Government of India would not have entered into the Standstill Agreement if it was not understood that Hyderabad would subsequently accede. The preamble of the Standstill Agreement clearly pointed out that India and Hyderabad would look to the interest of each other. The two ordinances did not benefit India in any way. And in advancing loan to Pakistan and installing diplomatic agent there, Hyderabad was doing something which it could not do before the 15th of August. As Shree Nehru pointed out, there were two contradictions in the Hyderabad situation. One was India's claim that Hyderabad should accede to India and Hyderabad's attempt to retain its sovereignty. The second was the authoritarian regime in the State and the democratic urge of of the people. Infact these two were interrelated. It was made clear to Hyderabad that once it acceded the matter of responsible Government would be decided by the Nizam and his people and if the Nizam did not accede, then he must grant responsible Government. The Nizam replied that the question of the form of Government was purely an internal matter and the Government of India had nothing to do with it. Meanwhile the activity of the Razakars, that is the members of the Ittehad-Ul-Muslimeen increased in intensity and the Hyderabad Government, inspite of repeated request from the Government of India did nothing to supress their activity. All negotiations to bring about a peaceful solution of the Hyderabad problem failed. On 21st June 1948, Lord Moutbatten left India and Mr. C. Rajagopalachari became Governor-General in his place. Law and order now completely broke down in Hyderabad. So police action was started by India against Hyderabad. On the evening of 17th September, the Hyderabad army surrendered and military Government was established on 18th September. The Nizam issued a proclamation by

which Hyderabad acceded. On 23rd November 1949 he issued a firman declaring the constitution framed by the Constituent Assembly of India to be the constitution of Hyderabad.

The military operation against Hyderabad was apparently a violation of the liberty of Hyderabad but in reality it was a campaign to liberate the people of Hyderabad from the autocratic regime of the Nizam and the tyranny of his associates.

Of the smaller States, a few merged with the Provinces of Madras, East Punjab, The United Provinces, West Bengal and Assam. Among the bigger States Baroda acceded to Bombay. There were some other States which for administrative or strategic reasons, were kept under the direct control of the Government of India. These were constituted into Chief Commissioners Provinces. These States were six in number, viz. The Punjab Hill States, Bilaspur, Kutch, Tripura, Manipur and Bhopal. Vindhaya Pradesh was first formed into a Union and later converted into a Chief Commissioner's Province. The Khasi Hill States, twenty in number, inidvidually and collectively acceded to the Indian Union. The Instrument of Accession empowered the Indian Legislature to legislate on any subject.

With the formation of Pakistan by June 3 Plan, the necessity for a weak federal Centre in India with power to legislate only on three subjects of Defence, External Affairs and Communication, disappeaned. After some statutory amendments in the provisions of the Government of India Act of 1935, the states merged with the Provinces were treated as part of the Provinces. The new Chief Commissioner's Provinces were brought in line with the old Chief Commissioner's Provinces like Delhi. The new feature in this was that the merged states were allowed to send their representatives to the Provincial Legislatures.

In May 1949 it was decided by the rulers that separate constitutions for the states and the Unions with separate Constituent Assembly were unnecessary and the Constitution framed by the Constituent Assembly of India would apply to them all.

The new Constitution of India began to function from 26th January 1950. And the component parts of the Indian Union

were divided into four categories and this position continued till the re-organisation of the states in 1956. In the first category were included the nine Governor's Provinces with increased territory by the merger of few states. These were called the Part A states. In the second category came the three big states of Hyderabad, Jammu and Kashmir and Mysore and the five Unions of Madhya Bharat, PEPSU, Rajasthan, Saurashtra and Travancore-Cochin. These were called Part B States. Part C states comprised of the three old Chief Commissioners Provinces of Ajmer, Coorg and Delhi and the seven new ones viz. Bhopal, Bilaspur, Kutch, Manipur, Tripura, Vidhaya Pradesh and Himachal Pradesh. The fourth category called Part D states comprised of Andaman and Nicobar islands which were directly administered by the Centre.

The difference between Part A and Part B states was nominal. In place of Governors in Part A states, the head of the States was called Rajpramukh. The Rajpramukh of Hyderabad was to be the Nizam of Hyderabad himself. The Rajpramukh of Mysore, Jammu and Kashmir were to be the persons who for the time being were recognised by the President to be the Maharaja of the states concerned. In other states the Rajpramukh was to be the persons recognised as such by the President. A Governor's tenure of office is for five years while the Bajpramukh was to continue in office either until his death or so long as the President continued his recognition of the person as the Rajpramukh of the state.

With regard to the judiciary also there was a slight difference. While the salaries of the High Court judges of Part A states have been fixed by the Constitution, the salaries of the judges in Part B States were to be fixed by the President after consultation with the Rajpramukh.

As regards legislative relations between the Centre and the Part B states, they were exactly like those between the Centre and Part A states. With regard to administrative relations Part B states unlike Part A states, were placed for a period of ten years from the commencement of the Constitution under the general control of the Centre and their Governments were to comply with such particular directions as might be given to them from time to time by the President (Article 371 of the Indian Constitution).

This was the position until Re-organisation of states in 1956. Mysore was freed from the Central control even before that. The case of Mysore has been discussed by us in the concluding Chapter.

With regard to financial relations, it was mentioned that the Government of India could enter into any agreement with the government of any Part B states with regard to the following matters.

(1) The levy and collection of any tax or duty leviable by the Government of India in such state and the distribution of the proceeds of the same.

(2) The grant of financial assistance by the Centre to such state as a result of loss of revenue suffered by the state due to any former state revenue coming within the Centre's jurisdiction.

(3) The payment to be made by such a state to the Centre in connection with the privy purse of the ruler.*[9]

Any such agreement was to continue for a period not more than ten years provided the President terminated or modified it earlier after consideration of the Finance Commission's report.*[10]

The entire provision for Part B states was a temporary one necessitated by the all too sudden integration of the Princely states into the territory of India. As the change-over from autocracy to democracy required some time, so the temporary provision was made in the Constitution which lasted only upto 1956.

(Section 2)

Among all the Indian States, Kashmir comes under a special category. So we devote this section to Kashmir. Allan Campbell Johnson says,

"Junagadh was a mere curtain raiser to the complex problem posed by the delayed accession of Kashmir."[11]

Kashmir is geographically speaking contiguous to both India and Pakistan. But the political situation was rendered complex by the fact that the majority of the subjects were Muslims while the Maharaja was a Hindu. But inspite of the Muslim majority in

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[9] The Constitution of India, Article 278, Clause 1(a), (b) & (c).
[10] *Ibid.* Article 278, Clause (2).
[11] Campbell-Johnson Allan : Mission with Mountbatten, p. 358.

the State, there was a powerful Kashmir State Congress movement led by Sheikh Abdullah, a Moslem Congressman.

Three days before the transfer of power, the Kashmir government announced its intention of signing the Standstill Agreement with both India and Pakistan. India did not press Kashmir to accede. For this once only, the States' Ministry according to Patel's directions, did nothing to induce a State to accede. But Kashmir did not accede to Pakistan also and a gang of North West Frontier tribesmen attacked Kashmir. India had given assurance to Kashmir that if she acceded to Pakistan that would not be taken amiss by India.*[12] But the Maharajah failed to take any decisive step. Dangerous as this indecision was for the safety of Kashmir, the reason for it is not far to seek. If Kashmir acceded to Pakistan, there was the danger that Pakistan would try to remove the Hindu dynasty from the throne of Kashmir. If she acceded to India, the Indian Government would try to end the Maharaja's rule as it was against the progress of their democratic ideals. Lord Birdwood has rightly said,

"And yet, in view of the position of his State for which there was no precedent in Princely India—his hesitation merits sympathy. His apology would be that the consequence of a hasty step might prove disastrous and his particular problem needed further reflections in the light of experience elsewhere in the India of the Princes. In this there was much truth."[13]

But as later history proves, the Maharajah had to pay dearly for his indecision. Thus Allan Campbell-Johnson writes, "The Maharaja's chronic indecision must be accounted a big factor in the present crisis. Almost any course of action taken quickly would have saved his State from this turmoil."[14]

As the tribesmen were being taken towards Srinagar by Rowalpindi Road by military transport, Kashmir Government asked for help from India. It was indeed a critical and at the same time a complicated situation. There was the immediate necessity to rush in troops in aid of Kashmir. Yet how could help be sent to a neutral State ? At the meeting of the Defence

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12 Menon V. P.: *Op. cit.* p. 394.
13 Birdwood Lord : Two Nations and Kashmir, pp. 40-41.
14 Campbell-Johnson Allan : *Op. cit.* p. 223.

Committee held on 25th October, 1947, Mountbatten stressed the point that Kashmir should accede before troops could be sent there. V. P. Menon who was sent to Kashmir, brought back with him the Maharaja's letter of accession. In fact this might seem to be a departure from Mountbatten's previous policy, because it was he himself who had advised the Maharajah not to accede to either Dominion without ascertaining the will of the people.*[15] But in view of the grave crisis in Kashmir, the Government of India changed its policy. Mountbatten thought that it would be the height of folly to send troops to a neutral Kashmir, because in that case Pakistan also might do the same with regard to other States. So the Maharajah was asked to accede and while accepting the accession the Maharaja was told that acceptance "was conditional on the will of the people being ascertained as soon as law and order were restored."[16]

India then sent troops to Kashmir and a heavy fighting went on near Srinagar. The fact of Pakistan's liability was proved by a conversation between Mountbatten and Mr. Jinnah at a meeting between the two at Lahore.

"Mountbatten advised Jinnah of the strength of the Indian forces in Srinagar and of their likely build up in the next few days. He told him that he considered the prospect of the tribesmen entering Srinagar in any force was now remote. This led Jinnah to make his first general proposal which was that both sides should withdraw at once and simultaneously. When Mountbatten asked him to explain how the tribesmen could be induced to remove themselves, his reply was, 'If you do this I will call the whole thing off,' which at least suggests that the public propaganda line that the tribal invasion was wholly beyond Pakistan's control will not be pursued too far in private discussion."[17]

An Emergency Administration was set up in Kashmir with Sheikh Abdullah and other National Conference leaders as members, which came to be recognised by the Ruler as the regular administration. On 30th December 1947, the Government of India took the issue to U. N. The United Nations sent a Commission to India which reached India on 10th July and after one month's

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[15] *Ibid.*, p. 224.
[16] *Ibid.*, p. 225.
[17] *Ibid.*, p. 229.

tour submitted a Cease Fire memorandum to both Dominion Governments. After prolonged negotiation cease fire was agreed upon in January 1949. A resolution was now proposed by Great Britain, U.S.A., Norway and Cuba for the appointment of a mediator so that there might be demilitarzation in Kashmir and the situation might be favourable for holding plebiscite. On March 14th the Security Council adopted the resolution. Sir Owen Dixon was appointed this mediator. On November 20th Dixon submitted his report in which he admitted his failure to bring about a settlement. The report held that Pakistan troops really joined in the invasion of Kashmir and had helped the tribal invaders. India demanded that Pakistan should be declared to be agressor but Sir Owen said that he was not asked by the Security Council to make such a declaration. He suggested two alternatives for solution of the Kashmir problem—either withdrawal of both Indian and Pakistan forces from Kashmir and arrangement of plebiscite with U. N. force to maintain order and peace or the partition of Kashmir on the present basis. Neither of the two alternatives was acceptable to both India and Pakistan. In the U. N. Security Council which took up the Kashmir dispute in February 1951, an Anglo-American resolution held that a final settlement of the Kashmir issue could be made only after a free plebiscite conducted by the U. N. As Sir B. N. Rau announced that this resolution was not acceptable to India, a revised resolution recommended demilitarization of Kashmir. Inspite of India's declaration of her inability to accept the decision, the resolution was passed in the Security Council on March 30, 1951. On 13th April, the Security Council appointed Dr. Graham to report on the Kashmir situation. He submitted his report on October 1951. The main points in Dr. Graham's recommendations to the Security Council were that

(a) the Security Council should call upon the two Governments to avoid increasing their military potential in the States of Jammu and Kashmir. They should also urge their official spokesmen, citizens' organisations and radio stations not to make propaganda against each other.

(b) the Security Council should try to make renewed effort for bringing about demilitarization of Jammu and Kashmir.

At this time election to the Kashmir Constituent Assembly was held and the result was almost cent per cent success of the National Conference candidates. The Maharaja's son, who was his regent duly authorised the Constituent Assembly to draft a Constitution for Kashmir. The Constituent Assembly of Jammu and Kashmir met for the first time in March 1952 and began the work of drafting a Constitution for Kashmir which would make it an autonomous unit within the Indian Union. The Basic Principles Committee recomended to the Constituent Assembly abolition of the hereditary Monarchy and election of a popular head of State to be called Sadar-i-Riyasat. In July 1952 talks were held in Delhi between the Government of India and the representatives of the Government of Jammu and Kashmir and agreement on the details of accession was reached. The Kashmir Assembly elected Yuvaraj Karan Singh. He was sworn in as the Sadar-i-Riyasat and hereditary monarchy in Kashmir came to an end.

Negotiation was going on at this time between India and Pakistan about the appointment of an impartial Plebiscite Administrator. The name of Admiral Nimitz suggested by the Security Council and approved by Pakistan was not to the liking of India because Admiral Nimitz represented one of the great World Powers and according to Shree Nehru,

"The Great Powers are too entangled in their difficulties and often pull against each other. Hence it has become the normal practice to avoid having representatives of those Powers in any matter requiring some kind of neutral and impartial approach. That is no reflection on any Power, much less on an eminent person like Admiral Nimitz. It is merely an appreciation of the facts of the present-day situation."[18]

Before agreement on this point was reached, all the chances of agreement were destroyed by Press reports towards the end of 1952 of a possible military alliance in west Asia with Pakistan as one of the participants. This became a matter of grave concern to all the political parties in India as this would bring the "cold war" to the door of India. When the American President formally announced on 25th February 1954 his decision to give military assistance to Pakistan, he gave an assurance that in case arms given

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[18] Quoted in Gupta, Sisir : India's Relations with Pakistan, p. 11.

to Pakistan were used for agreession against any country, he would take steps within and without U. N. to prevent it. Referring to this Nehru said in the House of the People," I have no doubt that the President is opposed to aggression. But we know from past experience that aggression takes place and nothing is done to thwart it."[19]

As the maintenance of an atmosphere of neutrality in Kashmir was no longer possible, negotiation about the appointment of a Plebiscite Administrator broke down. It was at this time that the Constitution (Application to Jammu and Kashmir) Order 1954 was passed and Kashmir was included in a special category under the First Schedule of the Constitution. This was later amended by the Second Amendment Order in 1958. The special treatment is seen in the fact that the head of the State is to be clected, Jurisdiction of Parliament over Jammu and Kashmir would be limited and the supreme Court would have no jurisdiction in Kashmir. Then again the State List and the concurrent List would have no application with regard to Jammu and Kashmir. Article 248 (giving the residuary power to the centre) and Article 249 (providing for extension of the jurisdiction of Parliament if the Council of States passes a Resolution to the effect) have been omitted. In the States Re-organization Act, 1956 when all other Part B States were abolished and with alteration of Boundaries became Part A states,-Kashmir as the sole exception, was retained in the category of Part B State. This is because Kashmir, like other Indian States had acceded to India with regard to only three heads, viz. defence, foreign affairs and communications. But the other States subsequently merged themselves with India while the Kashmir issue assumed a different character due to reference to the Security Council of the U. N. and U. S. military aid to Pakistan in February 1954.

The U. N. Security Council sent Mr. Gunnar Jarring (14th March to 11th April, 1957) and Dr. Frank Graham (January 12 to February 15, 1958) to India in order to tackle with the complicated problem of Kashmir. But they could not solve the problem as India insisted on the evacuation of the Indian territory of Jammu and Kashmir by the Pakistani tribesmen and Pakistan laid stress on plebiscite. India then decided to extend the

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[19] Speech of Shree Jawaharlal Nehru in the House of the People on 1 March, 1954.

jurisdiction of the Supreme Court and the Election Commission to Jammu and Kashmir. Mr. A. Shahi, Pakistan's Deputy Resident Representative in a letter to the President of the Council, dated 9th September, 1959 attracted his attention to this contemplated move of India. Mr. C. S. Jha, the Indian Resident Representative at the United Nations wrote a letter to Dr. Koto Matsudaira of Japan, the President of the Council. In this letter, dated October 12, 1959 he rejected the argument that the accession of Jammu and Kashmir was still to be decided.

The following are some of the extracts from the letter of Mr. Jha to the Presidetn of the Security Council.

"(2) Since its accession towards the end of October 1947, Jammu and Kashmir has been a constituent state of the Indian Union. It was because of this fact that the Government of India complained on January 1, 1948 to the Security Council against Pakistan aggression on the Indian Union territory of Jammu and Kashmir. It was also on the basis of this position that the United Nations Commission for India and Pakistan framed its resolution dated 13th August, 1948 and 5th January 1949 and gave various assurances to the Prime Minister of India on behalf of the Security Council.

"(3) The situation about which the Government of India complained to the Security Council in January 1948 is still unresolved. The Pakistan forces still continue to illegally occupy Jammu and Kashmir territory which they were directed to vacate under the resolution of the United Nations Commission for India and Pakistan dated 13th August, 1948.

"(4) The Government of India under the circumstances was surprised that the Government of Pakistan which have repeatedly stressed their preference for democratic methods and the rule of law, should, in this case, consider it necessary to object to normal democratic, legal and administrative processes introduced in the territory of the Indian Union at the request of the Government of the Constituent State....."[20]

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[20] Extract from the letter of Mr. C. S. Jha, Ambassador, Extraordinary and Plenipotentiary, permanent representative of India to the United Nations. Amrita Bazar Patrika dated 15th October, 1959.

The State Legislature of Kashmir which concluded its autumn session early in the month of October, 1959 passed an official Bill amending the State Constitution to make the way clear for the Central Election Commission to function in Jammu and Kashmir.

The same Bill introduced another reform which was to bring the status of the States' High Court Judges on par with other High Court judges in the country. So far the State Legislature could, by a resolution passed by two-third majority, recommend to the President of India the removal of a High Court Judge from office. Now this right was vested in the Parliament.

As Shree K. Rangaswami wrote in January, 1960, from his interview with President Ayub Khan, Minister Mansur Quadir and others, it was clear that they were for including Jammu and Kashmir in the territroy of Pakistan. The President gave three reasons as to why Pakistan needed Jammu and Kashmir. These reasons were the natural affinity of Pakistanis with the Kashmiris, Pakistan's economy and Pakistan's security. The President emphasised that he was not ready to recognise the present Government in Kashmir to be the representative of the people. Shree Rangaswami also mentioned the fact that the general attitude of the Ministers and others was that as India agreed to a plebiscite, she must honour her commitments.[21]

Summing up the dispute between India and Pakistan (that is its development upto 1958) Michael Brecher writes,

"Kashmir symbolizes the root of the confiict between India and Pakistan. Here lies the last field of battle over the ideological cleavage which rent the sub-continent asunder in 1947. Here is the final test of the validity of the two nation theory.....Indian leaders still reject the theory though they accepted partition on grounds of self-determination."[22]

India continues to claim Kashmir as part of India in the belief that here the future of her secular state is at stake. As the attention of the world is still focused on Kashmir, it is natural to forget or to minimize the importance of the achievement of

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[21] An Article by Shree K. Rangaswami published in the Hindu, dated the 9th January 1960.

[22] Brecher Michael : Nehru, a Political Biography, p. 577.

the Indian States Ministry in regularizing the position of the other Princely States. But we have to admit that the statesmanship with which Sardar Patel dealt with the States is like a miracle. The great problem of the future of near about 600 Indian States all on a sudden vanished into past history. Michael Brecher truly says,

"Few believed it possible to reconcile the conflicting claims of the Government of India and hundreds of Princes without bitter strife certainly in so short a period. Yet apart from Kashmir and Hyderabad, there was no loss of life. It was a bloodless revolution without parallel in this century."[23]

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[23] *Ibid.*, pp. 403-404.

CHAPTER VIII | DIVISION OF LEGISLATIVE POWERS—LIST I

The Constituent Assembly of undivided India which first met on 9th December 1946 reassembled as the sovereign Constituent Assembly of India on 15th August 1947. The Constituent Assembly appointed a Drafting Committee, which prepared a Draft Constitution which was published in February, 1948. The Draft was presented to the Constituent Assembly on the 4th of November 1948 and went through the usual procedure of first, second and third readings. It was finalised on 26th November, 1949. The Constitution began functioning on 26th January 1950.

This Constitution presents a division of legislative and financial powers between the Centre and the Units. One of the primary conditions of federating is that the authorities general and regional should wield co-equal powers.

According to the recommendations of the Joint Select Committee of 1933-34, the jurisdiction of each authority will be separate and if one invade the province of another, its enactment will be declared ultra vires by the courts. This recommendation was adopted and thus the Government of India Act of 1935 totally changed the basis of the legislative relation between the Centre and the units which existed before it. The Indian Constitution which started functioning on 26th January 1950 follows in general this division of legislative powers.

Article 245 (1) of the Constitution lays down,

"Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India and the Legislature of a State may make law for the whole or any part of the State."

Thus the same Article in the Constitution lays down the powers of both the legislatures and neither is made subordinate to the other. The power of both is derived from the same Constitution and this is why one body cannot alter these powers without the consent of the other. In other words, this is a limitation upon the otherwise unlimited power of the Parliament.

Then again, Article 246 lays down,

"Notwithstanding anything in Clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the Union List.)"

Clauses (2) and (3) lay down rules for the enactment on subjects enumerated in the Concurrent and the State Lists. So the words "notwithstanding anything in clauses (2) and (3)," ensure the predominance of the Union legislature, that is, the Parliament in case of overlapping legislation. The main items in the Union List are defence, foreign affairs, communication, banking, currency and coinage, Union duties, taxes and the like.

The provision with regard to the States is laid down in Article 246 (3), which says,

"Subject to Clauses (1) and (2), the legislature of any State specified in Part A or Part B of the First Schedule has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List 11 in the Seventh Schedule (in this Constitution referred to as the "State List").

As Clauses (1) and (2) enumerate powers of the Union and Concurrent powers, this provision ensures that the State Legislatures should not encroach upon the field kept reserved for the Union.

The main items in the State List are public order and police, local government, public health and sanitation, agriculture, forest and fisheries, education, state taxes and duties and the like.

Article 246 (2) says,

"Notwishstanding anything in Clause (3), Parliament and subject to Clause (1), the legislature of any State specified in Part A and Part B of the First Schedule also have power to make laws with respect to any of the matters enumerated in List III of the Seventh schedule (in this Constitution referred to as the "Concurrent List").

There are 47 items in the Concurrent List, the main being criminal law and procedure, civil procedure, marriage and contracts,

trusts, welfare of labour, social insurance, economic and social planning.

Clause 248 (1) lays down,

"Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List."

Thus the residuary powers are vested in the Centre. In the Objective Resolution which was adopted by the Constituent Assembly of India, we find the following provision :—

"The said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the Constitution, shall possess and retain the status of autonomous units, together with residuary powers and exercise all powers and functions of Government and administration save and except such powers and functions as are vested in or assigned to the Union or are inherent or implied in the Union or resulting therefrom."[1]

But the Union Powers Committee recommended that the residuary powers should remain with the Union (Except as regards the Indian States). The original idea was that the autonomy of the Provinces should be preserved but now with the establishment of Pakistan, there was no more any necessity of a weak Centre.

As Mr. Gopalaswami Ayyangar said,

"When we were merely trying to implement the Cabinet Mission Plan, we accepted the proposal of the Cabinet Mission that subjects not assigned to the Centre would be deemed to be assigned to the Provinces and in the case of the States, the language used was 'subjects not ceded by the States to the Federation would be retained by them'. Now in substance, it more or less amounted to the same thing. Viz. having listed out Federal subjects, what remained viz. the residuary subjects, would be with the Provinces in the one case and with the States in the other.

"Now....When this Committee met after its first report has been presented, we were relieved of the shackles which we had

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[1] Objective Resolution adopted by the Constituent Assembly of India, Constituent Assembly Debates vol. II, No. 3, p. 303.

imposed on ourselves on account of the acceptance of the Cabinet Mission Plan and the Committee came to the conclusion that we should make the Centre in this country as strong as possible consistent with leaving a fairly wide range of subjects to the Provinces in which they would have the utmost freedom to order things as they liked. In accordance with this view a decision was taken that we should make three exhaustive lists, one of the Federal subjects, another of the Provincial subjects and the third of the concurrent subjects and if there was any residue left at all, if in future any subject cropped up which could not be accommodated in one of the three Lists, then that subject should be deemed to remain with the Centre so far as the Provinces are concerned."[2]

So the residuary powers have been given to the Centre. The Union is apparantly made stronger by many other provisions of the Constitution. Article 249 lays down that if the Council of States passes a resolution supported by two-third of the members present and voting, that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List, it will be lawful for Parliament to make such law. This provision is in glaring contrast with the division of powers followed in the Constitution of the United States of America. Infact if the Centre is allowed to assume powers enumerated in the State List, one of the essential principles of federalism viz., the principle of co-equal and independent power of the two authorities, is destroyed. However the provision of the Article can be justified on the ground that the main body of the Council of States will consist of members elected by the legislative Assemblies of the States. Hence the Centre will assume power over the States with the consent of the majority of their representatives in the Central Legislature. So the two conditions necessary viz. the consent of the majority of the members of the Council of States and a feeling that such provision is necessary for the time being in the national interest, will put a check upon the arbitrary use of power by the Parliament. We may imagine one contingency. When the Parliament legislates under Article 249 for a part of India with the consent of two-third members of the Council of States, it may be that the members

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[2] Constituent Assembly Debates, Vol. V. No. 3, p. 39.

belonging to that particular area do not give their consent. Yet Parliament will assume the power. The question here relates to one political fiction assumed in every Parliamentary form of Government that the consent of the majority is the consent of all. This provision, however, has got nothing to do with emergency. National interest may require the Parliament to pass law under this Article even in peacetime.

Strictly speaking there is no analogous power in any other Constitution. The Canadian Constitution is also one of double enumeration in which S. 91 and S. 92 enumerate the powers of the Parliament of Canada and the Provincial legislatures respectively.

"With regard to matters not covered by the exclusive powers of Provincial Legislature, the Canadian Parliament may make laws in the national interest although there may be no emergency. The test is only whether the matter is of national importance and not whether there is any emergency."[3]

But, "Under the Canadian Constitution, as interpreted by the Judicial decisions, even in national emergency, the Dominion Parliament is held to have power to legislate on a subject matter, which prima facie falls exclusively within the Provincial field, only by a circuitous process by holding that under the circumstances the matter is not a Provincial subject at all."[4]

Article 250 of the Indian Constitution lays down,

"Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List".

Therefore as soon as an emergency is declared, the Indian Constitution will be switched off into a unitary one. So we can say that the emergency powers destroy the whole provision for division of powers. In other words, the very subject under consideration viz. the division of powers in the Indian Constitution, turns out to be division of powers in peacetime.

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[3] Chitaley, V. V. and Rao S. Appu: A.I.R. Commentaries on the Constitution of India Vol. III (This Volume has no page number).

[4] *Ibid.*

Now Emergency can be declared by the President of India by a Proclamation when he is satisfied that the security of India or any part of its territory is threatened by war or external aggression or internal disturbance. When the Proclamation is issued, if the House of People is not in session, the Proclamation can remain valid for two months. So the Emergency power will not be an arbitrary power assumed by the President.

Article 252 gives power to Parliament to legislate for the States with their consent. That is to say, if two or more States feel that Parliament should make laws for them with regard to matters like public health, agriculture, forest, fisheries etc, and a Resolution is passed by all the legislatures of those States to that effect, Parliament can make law to regulate such matters.

Article 253 gives Parliament power to make laws to implement treaties or agreements with other countries. In the United States of America, where the constitutional division of powers is as rigid as possible (though not so much in practice), a treaty is regarded as "The Supreme Law of the Land". Infact like other countries, in India the Union has the sole right to enter into treaties or international contracts and if it cannot give guarantee that the terms of the agreement will be implemented in the country, no foreign country will be ready to enter into an agreement with India. So the limitation that is put upon the powers of the States by this Article, is a reasonable limitation.

Article 254 lays down that in case of repugnancy between the Union laws and the State laws, the former will prevail. Infact there is the greatest chance of the occurence of repugnancy and conflict in respect of the subjects enumerated in the concurrent list. But Clause (2) of the same Article provides that if the President gives his consent, a state law will prevail over a Union law even in case of repugnancy. This is analogous to a similar provision in the Government of India Act 1935, in which the Covernor-General had the power to make a Provincial law prevail over a Union law in case of repugnancy.

The Indian Constitution follows the Government of India Act 1935 in many other respects among which the provision for the three Lists is one.

List I of the Seventh Schedule of the Constitution enumerates in 97-Entries, the subjects over which the Union Legislature, that is, the Parliament can legislate. In the Government of India Act of 1935, there were 59 Entries in List I. There was a feeling among some of the members of the Constituent Assembly that the Union was being given too much power. As Shree K. Santhanam said,

"They have tried to take the Government of India Act as their basis and considered what items can be transferred from the Provincial List to the Concurrent List and Provincial List to the Federal List.

I do not want that the Central Government should be made responsible for everything. The initial responsibility for the well-being of the people of the Province should rest with the Provincial Governments."[5]

On the very next day, Shree Alladi Krishnaswami Ayyar said in refutation of these arguments.

"We have been crying about a strong Centre. If you look at the Provincial List, very few, if at all of the items in the Provincial List have been taken up and transferred to the federal list..... We ought to take item after item in the Central List and see which of them can be transferred to the provincial list instead of arguing abstractly..... Having regard to the exigencies of the Indian situation, concentrating our attention upon the main topics of national interest in their relation to the subjects, we have to see which of them can find a place in the Central list, which of them can find a place in the Concurrent list and which of them can find a place in the Provincial list. That would be a more useful mode of approach than a general attack upon the Centre, Provinces and so on....."[6]

On the whole the 97 Entries in List I of the Seventh Schedule of the Constitution can be divided into 14 groups. They are—

(1) Defence—Entries 1 to 7 of List I of the Seventh Schedule of the Constitution can be included within this group. Of these entries, 6 and 7 had no corresponding entries in the Government of India Act, 1935.

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[5] Constituent Assembly Debates, Vol. V. No. 3, p. 56.
[6] Constituent Assembly Debates, Vol. V. No. 4, p. 75.

(2) Foreign affairs—Entries 9 to 16 of the Constitution deal-with foreign affairs. Of these entries 11, 12, 13, 15 and 16 had no corresponding entries in the Government of India Act 1935.

(3) Citizenship—Entries 17, 18 and 19 of the Constitution deal with citizenship. All these had corresponding entries in the Government of India Act 1935.

(4) Communications—Entries 22 to 31 of the Constitution deal with communications. Of these entries, number 24 had no corresponding entry and entry 23 is taken from entry 18 of List II of the Government of India Act of 1935.

(5) Property—Entry 32 to 34 of the Constitution deal with property. None of these had any corresponding entry in the Government of India Act 1935.

(6) Currency and Coinage—Entries 36 to 38 of the Constitution. Of these entries 37 and 38 had no corresponding entry in the Government of India Act of 1935.

(7) Trade and Commerce—Entries 41 to 61 of the Constitution deal with trade and commerce. Of these, entries 42, 48 and 51 had no corresponding entries and entry 60 is taken from List III of the Government of India Act 1935.

(8) Institutions of National importance—Entries 62 to 68 of the Constitution deal with it. Of these entries 64 and 66 had no corresponding entries in the Government of India Act 1935.

(9) Consus—Entry 69 of the Constitution refer to census.

(10) Election and Public Service—Entries 70 to 75 of the Constitution refer to elections and public services. Of these entry 75 had no corresponding entry in the Government of India Act 1935.

(11) Provisions with regard to the Supreme Court and the High Courts—Entries 77 to 79 and entry 95 of the Constitution. Of these, 77, 78 and 79 had no corresponding entries.

(12) Union duties and taxes—Entries 82 to 92 and 96 of the Constitution. Of these entries 87, 90 and 92 had no corresponding entries in the Government of India Act 1935.

(13) Enforcement—Entries 93, 94 and 95 of the Constitution.

(14) Miscellaneous—Entries 8, 20, 21, 35, 39, 40, 56, 61, 68, 76, 80, 81 and 97 of the Constitution. Of these entries 20, 21, 56, 61 and 97 had no corresponding entries in the Government of India Act, 1935.

Of all these entries, entry 23 is taken from entry 18 of List II of the Act of 1935 and entry 60 from entry 33 of List III of it. So in order to see whether the Centre has been made stronger or not by the inclusion of these new items in the Constitution, let us see the nature of these powers which have been newly included in the Constitution.

Of the newly included entries, entry 6 mentions atomic energy and the mineral resources necessary for its production. Now atomic energey is a subject which had no existence in 1935 and even if it had, the States could hardly have any direct interest in it.

The other new entries are :—

Entry 7. Industries declared by Parliament by law to be necessary for the purpose of defence or prosectuion of war.

Entry 11. Diplomatic, consular and trade representatives.

Entry 12. United Nations Organization.

Entry 13. Participation in international conferences, associations and other bodies and implementation of the decisions made thereat.

Entry 15. War and Peace.

Entry 16. Foreign jurisdiction.

Entry 20. Pilgrimages to places outside India.

Entry 21. Piracies and crimes committed on the high seas or air.

These are related with defence and international affairs and do not come within the jurisdiction of the State powers in any federal Constitution of the world.

Entry 23 dealing with 'highways' is one of the entries which has been transferred from List II of the Government of India Act 1935 to List I of the Constitution. But Entry 23 in the Constitution does not simply mention highways but the high-ways

which are declared by Parliament to be of national interest. It is true that development of science and modern technological advances have given new importance to highways. The construction of hard metallic road and introduction of automobiles have made highways connecting links between obscure village markets and big ports where shipment for foreign trade is carried on. With the achievement of independence, highways, as means of quick and easy transport of troops, have assumed a new importance. So there can be no objection to the inclusion of this item in List I of the Constitution. Really speaking, this item was not mentioned in the 1935 Act. Item 18 of List II of that Act mentioned ordinary roads. Highways as such is a new item introduced in List I of the Constitution.

The following are some of the other newly introduced subjects. Entry 24. Shipping and navigation on inland waterways, declared by law to be national waterways.

Entry 32. Property of the Union.

Entry 33. Acquision and requisitioning of property for the purpose of the Union.

Entry 34. Courts of wards for estates of Rulers of Indian States.

Entry 37. Foreign loans.

Entry 38. Reserve Bank of India.

These are all subjects of national and not of Provincial interest. Entry 42 gives the Centre power over inter-State trade and Commerce. It is a subject which has been traditionally recognised to be within the jurisdiction of the federal government.

Article 1. Section 8 Clause (3) of the American Constitution confers on the Congress the power "to regulate Commerce with foreign nations and among the several states and with the Indian tribes."

In the case of Gibbons Vs. Ogden, Chief Justice Marshall explained very clearly the impact of Article 1 sec. 8 on the question of distribution of powers between the Congress and the States. This is what he said,

"The enumeration presupposes something not enumerated ; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally ; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the Government."[7]

Section 91 (2) of the British North America Act 1867 gives the Dominion Parliament in Canada exclusive legislative authority with regard to trade and commerce. In section 92 of the Australian Constitution there is an enunciation of the doctrine of the freedom of inter-state commerce. So by giving the Centre power over inter-state trade and commerce, India has followed the footsteps of other federations.

Most of the other newly introduced items in the Indian Constitution are of national importance. They are 48. Stock exchange and future markets ; 51. Establishment of Standards of quality for goods to be exported out of India ; 56. Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

6. Sanctioning of cinematograph films for exhibition (This was a concurrent power in 1935 being entry 33 of List III).

61. Industrial disputes concerning Union employees.

64. Institutions for scientific and technical education financed by the Government of India wholly or in part.

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

75. Service conditions of the President, Governors, Comptroller and Auditor-General.

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[7] Gibbons *vs.* Ogden (1824) discussed in Post, DeLancy and Darby : Basic Constitutional cases, pp. 183-184.

77, 78 and 79. Constitution and power of the Supreme Court and the High Courts.

87. Estate duty in respect of property other than agricultural land.

90. Taxes other than stamp duties on transaction in stock exchanges and future markets.

92. Taxes on the sale or purchase of newspapers and on advertisements published therein (After the sixth Amendment Parliament has also been given the power to legislate with regard to sale and purchase of goods other than newspapers where such sale and purchase takes place in course of inter-state commerce)

97. Residuary powers.

Entry 60 dealing with the sanctioning of cinematographic films for exhibition, has been transferred from List III of the Government of India Act of 1935. That is to say, under the Government of India Act the Provinces also had some control over it. But this is not a very important item and the loss of it by the States is not a great loss.

So the contention of Shree K. Santhanam in the Constituent Assembly that the framers of the Indian Constitution have tried to transfer the powers given to the Provinces under the Government of India Act of 1935 to the Union list, is not justified. We shall deal with the Concurrent List in a later Chapter. Let us now take the Union powers under the Constitution groupwise and see whether the powers are justifiable or not.

(1) The first group of subjects in List I of the Seventh Schedule is concerned with Defence. One of the primary reasons for federating is better defence from probable dangers, both internal and external and that is why, in all the four federations viz. the United States of America, Canada, Australia and India, we find the power to legislate for defence is given almost exclusively to the federal legislature.

Of all the defence items Shree K. Santhanam in the Constituent Assembly Debates criticised entry 7 which mentions, "Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war."

Refering to this Mr. Santhenam said, "Defence industries is one central item. Another item is, industries which the Federal Legislature may declare to be federal industry. In the provincial list is included any other industry which the Federal Legislature has not taken to itself either under this item or under the preparation for defence. What will the provinces do ? They will say that it comes under preparation for defence or defence industries or any other industry which has been declared by the federal law to be federal industry and they have no responsibility to develop industries."[8]

Mr. Santhannam was too pessimistic about the powers of the units. The Centre can declare an industry to be necessary for the purpose of defence not arbitrarily but under law of Parliament and Parliament will not declare emergency without sufficient reason. In all federations we find that in time of emergency, the need of defence is considerd to be more important than preservation of the federal structure. The need of defence is such a primary need, that it brooks no delay and requires the mobilization of the total resources of the country. So it would not be advisable to limit the powers of the Union by mentioning certain industries to be Provincial industries even in times of war.

Mr. G. L. Mehta said in criticism of Mr. Santhanam's speech, "At no time has the importante of preserving the economic unity of India been so evident as in our experience during war time or in the post-war period. The food question, for example, the whole question of rationing, all these require development and organization on an all India basis which does not permit territorial barrier or inter-provincial jealousies and for these problems, we require a comprehensive and integrated economic policy not only for our national advancement but for our very national existence."[9]

(2) In the next group, that is, foreign affairs, entries 9 to 16 are included. Entry 9 deals with preventive detention. It says, "Preventive detention for reasons connected with Defence, Foreign Affairs or the Security of India, persons subjected to such detention."

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[8] Constituent Assembly Debates, Vol. V. No. 3, p. 58.
[9] Constituent Assembly Debates, Vol. V. No. 4, p. 83.

The object of preventive detention is to take precaution against persons suspected of anti-social motives injurious to the interests of the State. Of course preventive detention suspends the enjoyment of fundamental rights by the citizes but speaking about division of powers, we find that this power is not given to the Union alone for Entry 3 of List III makes it a concurrent power.

Of this group Entry 13 "Participation in international conferences, associations and other bodies and implementing of decisions made," as also Entry 14." Entering into treaties and agreements with foreign countries and implementing treaties, agreements and conventions with foreign countries," raised some controversy among the members of the committee.

To Entry 13 (that is, what was Entry 14 before the Union Powers Committee), Sri V. T. Krishnamachari moved the following amendment :—

"Provided that the federation shall not by reason of this entry have power to implement such decisions for a province or a federated State except with the previous consent of the province or the State."

In support of this amendment, he said that now India participates in all kinds of conferences, associations and bodies. If the decision taken in those bodies relate to provincial subjects, the consent of the province should be taken before the decision is implemented.

"In the absence of such a restriction," he said, "the powers of Provinces and of States will become almost nugatory."[10]

Mr. K. M. Munshi while opposing the amendment, rightly said that at the international conferences decisions are taken with the idea that the representatives of a country have got the power to implement the treaties. India will lose her prestige if she wants to enter into agreements with the condition that implementation of those agreements will be subject to the consent of the unit Governments. Then again before the decisions are implemented, they will be debated upon in both Houses of the Parliament. So the representatives of the whole of India will get the opportunity

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[10] Constituent Assembly Debates, Vol. V, No. 6, p. 151.

of discussing the matter and coming to a decision as to whether the item is of all India interest or not.

There was much truth in what the next three speakers said. Pandit Hirday Nath Kunzru in opposing the amendment, said that the representatives who will go to the international conferences will not belong exclusively to the Central Secretariat or the Central Legislature. They will be taken from the Units as well. So there would be no chance of the Provinces being superseded by the Union on account of implementation of these decisions. Sir B. L. Mitter said that the matters which are ordinarily discussed in international conferences are matters of international and therefore of national interest and not of local interest. But even if such interests crop up, there will be representatives of the units in the Central legislature to judge whether the said decision is oppressive in nature or not. So there was according to him no danger in empowering the Central Legislature with this power.

Mr. Gopalaswami Ayyanger said that independent India has acquired a new status in the international world and it is necessary that at the International Conference and Associations, India should be able to speak with one voice and for that it is necessary that India as a whole should be able to implement all international decisions. He also said that when representatives of India go to international Conferences, they go on behalf of the federation as distinguished from the units of the federation and there should be no objection to the implementation of the decisions arrived at in the conferences.

So the original item was adopted.

Then the next Entry "The entering into and implementing treaties and agreements with foreign countries," was discussed.

Mr. Naziruddin Ahmad wanted to bring the amendment that at the end of the item, the following provisions should be added,' "On matters within the legislative competence and in other matters affecting a Province or a State, with the express consent of such State."

He said that if the Centre alone was empowered to enter into and implement all treaties, all the safeguards about the power of a Province would he reduced to nullity. So he wanted some-

constitutional provision that before going to international conferences, there should be some previous discussion with the province of the State.

Mr. Alladi Krishnaswmi ayyar rightly pointed out that inspite of the risk that the Centre might encroach upon the rights of the provinces, in almost all federations, the Centre has been given the power to implement treaties. He quoted the instance of the United States of American, Canada and Australia and said that the constitution of the United States of America even goes to the extent of saying that all treaties should be regarded as the supreme law of the land.

The amendment was negativated and the original item was adopted.

In fact in these two cases, that is, in case of implementation of the decisions at the international Conference or implementation of treaties, if the amendments proposed were adopted and previous consent of the Provinces was required, that would have reduced India to a confederation.

(3) Coming to the next group, that is, citizenship, we find that the next two entries viz. 17 and 18 relating to citizenship were adopted without any amendment. Inspite of the fact that India is a federation, the citizenship of India is single. This is in glaring contrast with the provision in the Constitutions of the U. S. A. where States citizenship and the Union citizenship are different from each other. As there is single citizenship in India, the Indian Parliament has been given planary powers with regard to citizenship and there is no analogous power given to the States.

(4) The next group relates to communication. Communication is one of the essential items given to the Centre in all federations. Whenever there was any question of the formation of even a loose type of Union in India as under the proposal of the Cripps Mission or the Cabinet Mission Plan, communication was always left to the Centre. Then again before their integration with India, when the Princely States singned the Standstill Agreement, they gave the Indian Union authority over Defence, External Affairs and Communication.

By the Government of India Act of 1935, the Centre was given power over railways but that was only over major railways. But our Constitution gives the centre power to legislate over major and minor both types of railways in order to ensure safety and bring about uniformity between the maximum and minimum of rates and fares in different parts of India.

Entry 23 gives the Centre power over national highways which was interpreted by Mr. Gopalaswami Ayyanger as the power over "construction and maintenance of national highways."[11]

It is clear that it is only for improving the highways and maintaining them at a higher standard than the resources of the states would permit, that the highways will be declared to be of national importance. There is no desire here to take away the powers of the Units.

By the following items the Centre is given power over "shipping and navigation on inland waterways which are declared by Parliament by law to be national waterways" (Entry 24), "maritime shipping and navigation" (Entry 25), "lighthouses and beacons" (Entry 26), "major ports which will be declared as such by Parliament" (Entry 27), "airways and its various branches" (Entry 29) and "Posts and Telegraphs, telephone, wireless, broadcasting etc." (Entry 31).

All these come within the group of communication and it is quite proper that the regulation of these matters should be entrusted to the Centre. According to the policy followed in the distribution of powers between the Centre and the units in federal constitutions, posts and telegraph are items which normally should come under the control of the Centre. As they bring one part of the country into close contact with all other parts, they are the artery of defence and the need of defence is one of the primary purposes for which a country federates.

(5) Property question comes under the fifth group. Entry 32 and 33 deal with it. Acquisition of property for the purposes of the State is a normal feature of a federation or of any State as such. In the U. S. A. a whole series of law grouped under the name "Eminent Domain Clause" has cropped up in this connection.

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[11] Constituent Assembly Debates, Vol. V. No. 7, p. 185.

Under the Indian Constitution property right, that is, the right to maintain or acquire property, is not given to the Union alone. The units are also given similar rights by Entry 35 of List II, which speaks of works, lands and buildings vested in or in possession of the States and by Entry 36 of list II which speaks of "Acquisition or requisitioning of property except for the purpose of the Union, subject to the provision of entry 42 of list III." The latter gives concurrent power to the Union and the Units to decide the principle on which compensation is to be paid to the party whose land is to be acquired or requisitioned.

(6) Next comes the group dealing with the Economic powers of the Union including currency and coinage viz. Entry 35, dealing with public debt of the Union, Entry 36, dealing with currency, coinage and legal tender ; foreign exchange, entry 37. Foreign loans and entry 38. Reserve Bank of India.

Article 292 gives the Union the executive power of borrowing upon the security of the Consolidated Fund of India, under laws fixed by Parliament. Article 293 gives the States the power to borrow within the territory of India, upon the security of the Consolidated Fund of the States, under laws passed by the State Legislatures. So the only limitation upon the power of the States in this connection is that they cannot borrow outside the territory of India. Under the Government of India Act of 1935, the Units could borrow outside the territory of India but this power is now totally denied. It is not very difficult to understand the reason why the units were given this power under the Act of 1935. It was one of the concessions to the Indian States to attract them into the Federation. The Muslim League also wanted a weak Centre.

But now that a separate State of Pakistan has been established and the Princely States have been integrated, the Union Government of Indian Dominion represents to the foreign countries the whole of India and has the sole right to enter into the international money market. To ensure uniformity, currency and coinage in all federations, are entrusted to the Union. So when after signing the Standstill Agreement Hyderabad declared that Indian coin will not be legal tender in Hyderabad, India Government took offence and asked Hyderabad to rectify it. The

reason was that to deny legal tender to Indian coins would mean that Hyderabad did not want to accede to India and the latter would remain a foreign country and her coins foreign coins to Hyderabad. It would also have adversely affected the trade and other economic ties of Hyderabad to India.

Entry 38 gives the Union power to pass laws with regard to Reserve Bank of India. It functions as the Central Bank of India and has complete monopoly of the issue of paper currency and thus controls the credit system of the country. With this entry we have to read entry 45 dealing with banking and entry 46 dealing with Bills of Exchange, promissory notes, cheques and other like instruments. It was decided in the case of Subramanyam Vs. Muttuswami in 1940 that,

"The reasons why these instruments are assigned to the Union Legislature is that uniformity of practice regarding these instruments for the whole of India is necessary. As they can be freely negotiated, they can circulate from Province to Province, and after successive endorsements can even be sued upon in Provinces other than those in which they were executed."[12]

So the reason for giving this item to the Centre is obvious. Uniformity of practice in this matter would also facilitate inter-state trade and commerce.

(7) Trade and Commerce—Entry 41 deals with trade and commerce with foreign countries ; import and export across customs frontiers ; definitions of customs frontiers. As this provision deals with a subject which necessarily crosses the boundaries of India, naturally it is the Indian Parliament which is authorised to legislate on it.

The next entry, that is, Entry 42 deals with inter-State trade and commerce but we find analogous power given to the States by entry 26 of List II and 33 of List III. Entry 42 of List I gives the Union power over inter-state trade and commerce. Entry 26 of List II gives the State power over trade and Commerce within the State but by Entry 33 of List III both the Union and the States get power over trade and commerce in and the production, supply and distribution of the products of industries where the

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[12] Subramanyam *vs.* Muttuswami, 1940.

control of such industries is declared by the law of Parliament to be necessary in the public interest. Entry 43 deals with incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations. Entry 44 deals almost with the same subject but relates to corporations whether trading or not, whose objects are not confined within the limits of one State. As entries 43 and 44 are to be read together, we find that these entries do not give the Union any new power over those corporations whose function is limited within the precincts of one State. Entry 32 of List II gives the States power to legislate over all corporations not mentioned in List I. That means the States get power over all corporations whose function is limited within the State. Whenever it becomes an inter-State matter, naturally the question of uniformity and co-ordination comes to the forefront and it is only the Union which can properly do so. So entries 42 and 43 can be justified.

The next few entries beginning with Entry 52, give the Centre power over items relating to mines, industry and labour. Development of industry is given by Entry 52 to the centre, when such development is declared by the law of Parliament to be necessary in the public interest. Growth of equitable industrial distribution in the country requires the Centre to have this power.

Shree G. L. Mehta said in the Constituent Assembly,

"Whatever the Constitutional set up may be, the relation-ship between the Centre and the Provinces will be determined by the economic forces and tendencies and financial considerations. Commerce, trade and industry today as well as the economic relationship which they involve are national in scope and cannot be easily divided into Provincial and Federal aspects for purposes of regulation."[13]

Referring to the development of industries which has been made a Central subject, he said,

"This is the only rational way of dealing with the subject. As far back as 1945, in their statement on industrial policy, the Government of India have stated that industries in which a common policy is desirable should be brought under Central control. Can

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[13] Constituent Assembly Debates, Vol. V. No. 4, p. 82.

we not trust the future Central Government of India to decide.... what are the essential industries.....and should be brought under central control ? In fact, in labour matters we know that in many respects uniformity is desirable ; otherwise there is the risk of one province being backward and another much ahead of it."[14]

So the development of industries has been entrusted to the charge of the Union but the States have not been completely deprived of any power in this respect, for Entry 23 of List II gives the States power over regulation of mines and mineral development subject to the provisions of List I in this respect and Entry 24 of List II gives the States power over industries subject to the provision in this respect in List I.

(8) Institutions of national importance—The next few entries give the centre such powers which are universally recognised to be of national importance, viz. Entry 62 gives the Centre power over the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial and any other institution financed by the Government of India. This Entry is analogous to Entry 27 in the Union Powers Committee. That entry wanted to give power to the Union over any institution declared by Federal law to be institutions of national importance. But Shree K. Santhanam moved an amendment to insert the words, "financed by the Federation wholly or in part." He said that if the Union was authorised to declare by law any institution to be of national importance, it might do so with respect to many institutions built up wholly by private or provincial funds. There might be some advantages of such declaration but it would not be always fair to those who finance the institutions. The amended item has nothing objectionable. Those institutions which are wholly or partly financed by the Union and which are or will be declared by the federal law to be of national importance, will legitimately fall within the legislative ambit of the Union legislature.

Entry 63 of List I of the Constitution mentions the Beneras Hindu University, The Aligarh Muslim University, the Delhi University and any other institution declared by Parliament to be of national importance. Entry 64 gives the Union power over

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[14] Constituent Assembly Debates, Vol. V. No. 4, p. 83.

institutions for scientific and technical education financed by the Government of India. By entry 65 Union agencies for professional and vocational or technical training and by entry 66 co-ordination and determination of standards in institution for higher education or research and scientific and technical institutions are entrusted to the Union legislature. These four entries, that is, entries 63, 64, 65 and 66 are to be read along with entry 11 of List II, which gives the State Legislatures powers over education including Universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I and 25 of List III. The last item mentions vocational and technical training of labour. Thus the States are given only residuary power with respect to education.

Next come groups (9), (10), (11), (12) and (13)—The next few entries viz. entries 68-76 deal with indisputably central subjects like survey of India, census, Union Public Services, all India Services, Union pensions, elections to the offices of the President and Vice-President, salary and service conditions of the members of Parliament, President, Governor and Comptroller and Auditor General.

Entry 77 gives Parliament power to legislate over the "Constitution, organisation, jurisdiction and powers of the Supreme Court....." and entry 78 "Constitution and organisation of the High Courts". Entry 3 of List II gives the state legislatures power to legislate over the "Constitution and organisation of all courts, except the Supreme court and the High Courts." Thus of all courts in the States the High courts are under the jurisdiction of the Union Legislature. It is not only that the Parliament can deal with the constitution, organisation and powers of the High Court but the jurisdiction of any High Court can be extended from the State in which it is situated to other States. This power is given to Parliament by entry 79. Entry 80 gives the Parliament power to extend the jurisdiction of the members of a police force belonging to a State to an area outside the State but while doing so, the consent of the Government of the State in which the area is situated, is to be taken. Entry 81 deals with inter-state migration and so it naturally comes within the scope of the Union legislature.

From entry 82 to entry 92 of List I and entries 45 to 63 of List II, we have financial division of powers and we have elaborately discussed them in a later chapter. Entry 97 gives to the centre the residuary powers, that is, the powers which are or will be left after enumeration in the three lists. These residuary powers were purposely given to the Centre to make the Centre strong so that India might be able to fight when attacked by a neighbouring State.

Apparently it seems that the Centre is made very strong by the provision of the residuary powers but when we remember that there are three elaborate lists, we understand that whatever items may crop up in future, they cannot be large in number. Then again the future is completely unknown and so it is safer to give the residuary powers to the Centre, which with its wider interest and co-ordinating power will be able to judge between the conflicting claims of the different States. Looking backward to the past, we find atomic energy was a subject unknown to anybody when the Government of India Act of 1935 was passed and we cannot find any harm in entrusting it to the Union. Supposing that India discovers in future means of space travel, the States would gain control over them if they possessed the residuary powers. Then there would be a number of conflicting policies with regard to such an important subject and India's prestige in the international sphere would be lost. Not only that, the Centre would have to be guided by such polices. So to give the residuary powers to the States would reduce the Indian Union to a Confederation and in our opinion it has been rightly reserved for the Centre.

CHAPTER IX | DIVISION OF LEGISLATIVE POWER—LIST II

We are now to deal with the legislative powers given to the States by List II. These powers can be divided up into two parts viz. those which are exclusive to the States and those which are shared with the Union.

Among the first group Entry I of List II gives the State Legislatures power to legislate with regard to public order. When the Draft Constitution was being discussed in the Constituent Assembly, Shri Brajeswar Prasad moved an amendment to transfer public order to List I. Though later on he withdrew the amendment, the arguments presented by him are worth consideration. He said that the administration of public order in the provinces had not been of a satisfactory character. States, he said, did not possess the resources to maintain an efficient system of administration. He presented one concrete instance. Seventytwo per cent of the budget of Assam, he said, went to pay the salary bill and the rest was left for managing a large number of subjects. The result was deterioration in the efficiency of administration. There were also States on the border of foreign States, where it was risky to leave public order to provincial governments. Then also there were the partitioned provinces with their problems of relief, rehabilitation and migration of population.[1]

As we have already said, Shree Brajeswar Prasad did not move his amendment and the item remained in the State List. If we remember that Parliament is given full power to legislate on the same subject in time of emergency, we may say that the power to maintain public order has been entrusted to the units but when order breaks down, the naval, military and air forces of the Union may come to the aid of the States and in that case the Union forces will not be controlled by the States.

Entry 2 of List II gives the States power to legislate over police. But if the Parliament thinks it necessary it can extend

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[1] Constituent Assembly Debates, Vol. IX. No. 23, pp. 864-865.

the powers of the police of a State outside the jurisdiction of the State. Of course, there is provision for consultation with the State authorities in this matter. By entry 3, administration of justice except the Constitution and organisation of the Supreme Court and the High Courts, is entrusted to the State Legislatures.

Among the subjects powers over which are not shared with the Union, we find prisons, local government, public health, relief of the disabled and the unemployed and burial grounds. Of these items Shree H. V. Kamath wanted to remove public health to List III. He said,

"Public health has been the cindarella of portfolios in the Cabinet of our country."[2]

"I know," he continued, "from my experience of certain provinces that the health schemes that are launched by Provincial Governments while commendable as regards their good intentions, fail to achieve the desired consummation, because of the lack of direction, and co-ordination from the Centre."[3]

For co-ordination and launching of health schemes on an all-India basis, he wanted to transfer the subject to the Centre. It is true that the Central Government can launch out various health schemes and methods of disease prevention. Shree Kamath mentioned vaccination like B. C. G. and Penicillin treatment which are done by the Central Government. But his amendment was negativated. Entry 29 of List III mentions,

"Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals, or plants."

Under this entry or under the Concurrent power over social and economic planning, the Centre can and is exerting its power of co-ordination and is also initiating schemes like those for family planning, prevention of malaria etc. But the primary duty of looking after public health has been entrusted here as in all other federations to the States. Infact, the outbreak of some diseases like cholera, chicken pox etc. are often local in character and if the States had to wait since they got direction from the Centre, the diseases would have worked havoc with the

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2 Constituent Assembly Debates, Vol. IX. No. 24, p 878.
3 *Ibid.*, p. 879.

lives of the people. So public health has been rightly entrusted to the States.

The following subjects are also exclusively given to the States :—

Agriculture, land improvement, agricultural loan, preservation of livestock, pounds, forests, protection of wild animals, gas and gaswork, markets and fairs, inns and innkeepers etc.

Of all these items, Shree Brajeswar Prasad wanted to make agriculture a Central subject because he thought that otherwise the problem of food supply and distribution would not be effectively tackled and schemes would come to maught.

The real problem, according to him, was to prevent sub-division and fragmentation of land. He said that we have to change the laws of inheritance if our national economy is to be laid on sound scientific basis. Therefore he wanted to nationalise agriculture. But the amendment was negativated.

Now, agriculture happens to be the principal industry in India and practically one of the main functions of the State and it would not be proper to give the Centre more power over this item than the power of co-ordination.

Among the other subjects which were exclusively given to the States, Prof. Shibban Lal Saksena and Shree Lakshinarayan Sahu raised some objection against betting and gambling. Their idea was that betting and gambling, which ought to be condemned as crimes, were being legalised in this way. But Dr. Ambedkar allayed their doubts by saying that if betting and gambling were eliminated from the Constitution, these crimes would not be driven out of the country. On the other hand, the State Governments would be powerless to make any law for preventing them.

All the other entries which are included in List II have some analogous entry in the Central list, e.g. pilgrimages to places outside India, intoxicating liquors, education, library, museum and such other institutions, ancient and historical monuments, communication, water supply, irrigation, canals, fisheries, courts of wards, regulation of mines, industry, trade and commerce, production, supply and distribution of goods, weights and measures,

corporations, theatres and dramatic performances, works, lands and buildings, acquision and requisitioning of property.

Adulteration of foodstuff was originally given to the States. But in the Constituent Assembly strong objection was raised against it. Shree Brajeswar Prasad wanted to transfer it to List III and said,

"Adulteration of foodstuffs and other goods have assumed scandalous proportions in this country. If is not a problem that is confined to one province. Therefore it must be tackled on an all-India basis."[4]

Adulteration of foodstuff was really transferred to List III and became entry 18 of the same.

From the powers which are partly given to the Centre and partly to the States as also from the Concurrent List, it may appear that the Centre has been made too powerful. It is true that many of the subjects in the Concurrent list are essentially of a Provincial chararter and will be ordinarily administered by the States according to State policy but the Centre is also given the power of co-ordination and unifying regulations.

Education comes within that group of powers, which has been partially given to the Centre and partially to the States. Education has been regarded as a State function in all federations. But in the Indian Constitution, only residuary power has been given to the States with regard to education for entry 63 in List I mentions some Universities which are union subjects, entry 64 of the same list mentions some educational institutions of national importance, entry 65 gives the Union power over agencies for professional education etc., entry 66 mentions co-ordination and determination of standards and entry 25 of List III makes vocational and technical training of labour, a Concurrent subject.

The States are given power over primary, secondary and even over University education and it has been made a Central subject only in those cases where Central guidance and the aid of Central finance are thought essential as in higher research and scientiffic institution,

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[4] Constituent Asssembly Debates, Vol. IX. No. 24, p. 903.

There are also some subjects like communication, irrigation, water supply etc. which are ordinarily dealt with by the States but the moment more than one State is affected, it is handled by the Centre. Even then we find that the States are given some important subjects like public order, police, State Public Services, offences against laws with regard to any matters in List II.

We have excluded financial questions from our list in this chapter, as a separate chapter is devoted to them. In the next chapter, we are dealing with the concurrent list.

CHAPTER X | DIVISION OF LEGISLATIVE POWERS—LIST III

The very first entry of the concurrent List mentions "criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the Civil power."

So though criminal law is made a concurrent subject, the powers given to Parliament by entry 93 of List I and to State Legislatures by entry 64 of List II are left undisturbed.

Entry 2 of the Concurrent List mentions criminal procedure including all matters mentioned in the Code of Criminal Procedure at the commencement of the Constitution. This is to be read as an exception to entry 95 of List I which gives Parliament the power to legislate on the jurisdiction and powers of all courts, except the Supreme Court with respect to any of the matters included in List I.

Entry 3, which deals with preventive detention, is analogous to entry 9 of List I. The latter item gives the Centre Power of preventive detention for reasons connected with defence, foreign affairs or the security of India and entry 3 of List 3 mentions preventive detention for the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community. Though public order is not a concurrent subject, preventive detention in connection with it has been made a concurrent subject. As defence of India is solely the charge of the Centre, security of the State also comes within it. But the purpose of including preventive detention connected with it within List 3 is to give scope to the State Legislatures to legislate when the question of security concerns one State only. Entry 4 of List 3 is analogous to it for it refers to the removal from one State to another of persons and detenus for reasons mentioned in Entry 3. As this involves the question of the security of more than one State, this could not possibly be given to the States alone and so it has been made a concurrent subject.

The next few entries mention marriage and divorce, transfer of property, contract, actionable wrong, bankruptcy and insolvency, trust, trustees, civil procedure etc.

Entry 20 of this List makes economic and social planning a concurrent subject. In order to realise the objectives aimed at in the Directive Principles of State policy, the Planning Commission was set up by the Government of India for the most effective and balanced utilisation of the country's resources. The States had to contribute their share of almost four-fifth of the total outlay. In order to bring down the plan to the village level, the Community Development Project and other rural development programmes were formulated in 1952. The overall charge of the programme is under the Ministry of Community Development. Under the Planning Commission in Delhi, there is the community Projects Administration itself. In each State, there is a State Development Committee Consisting of the Chief Minister and Ministers in charge of Development Departments for laying down the policy. The expenses for the execution of the projects are shared by the Centre and the States. Entry 21 makes commercial and industrial monopolies, combines and trusts and entry 22 makes Trade Unions ; industrial and labour disputes, concurrent subjects. These are to be read with entry 52 in List I and entry 24 in List II. The former mentions "Industries the control of which by the Union is declared by Parliament by law to be expedient in the public interest." Entry 24 in List 2 mentions "Industries subject to the provisions of Entry 52 of List 1." Thus the industries of public interest are made central subject ; other industries State subjects and industrial monopolies and industrial disputes concurrent subjects.

The three following entries deal with the welfare of labour, viz. 23 "Social security and social insurance ; employment and unemployment." The general power given under this heading is more specifically mentioned in the next two entries, that is, entry 24, which mentions welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits and entry 25 which mentions vocational and technical training of labour as concurrent subjects. Entries 36, 37 and 38 make factories, boilers and electricity, concurrent subjects. Entry 26 makes

legal, medical and other professions subjects for concurrent legislation. The Indian Constitution, of course, guarantees the freedom of profession to every citizen but Clause (6) of Article 19 authorises the State to impose reasonable restriction on the freedom of trade, profession etc., in the interest of the general public and also prescribes the professional or technical qualification necessary for carrying on any trade or profession. So legal, medical and other professions have been made a concurrent subject, so that the Centre may set a uniform standard for the technical education necessary for the professions and the States may control any private institution from issuing indiscriminate degrees. Relief and rehabilitation of displaced persons, charities and charitable institutions, prevention of infectious diseases spreading from one State to another, statistics regarding birth and death are also included in the concurrent list. Entry 31 mentions ports other than those declared by or under law made by parliament or existing law to be major ports. Entry 27 of List 1 makes major ports a union subject but ports in general under the present entry have been a concurrent subject. Then just as entries 24 and 30 give the Union power over national waterways, entry 32 of List III makes shipping and navigation on inland waterways as regards mechanically propelled vehicles, concurrent subject. Entry 35 of List III mentions separately mechanically propelled vehicles including the principles on which taxes are to be levied, entry 33 of List III mentions trade and commerce in, and the production, supply and distribution of the products of industries where the control of such industries by the union is declared by Parliament by law to be expedient in the public interest.

Entry 42 of List I gives the Parliament exclusive power with regard to inter-State trade and commerce. Entry 26 of List II gives the State power to pass legislation with respect to trade and commerce within the State. But by the present Entry power is given to Parliament to legislate even when the matter is related to trade and commerce within the State if the control of such industries is declared by Parliament by law to be expedient in the public interest. Entry 34 of List III gives independent power of price control to the Centre and the Units. Though it appears to be a wide power, price control, with regard to inter-State trade

and commerce will necessarily be confined within the jurisdiction of Parliamentary legislation. Yet the present Entry gives power to both the Centre and the Units to take strong measures against black marketing. By entry 39 newspapers books and printing presses have been made concurrent subjects. This entry is to be read along with Article 19 which says that 19 (1)—All citizens shall have the right—(a) to freedom of speech and expression (2) Nothing in sub-clause (a) of Clause (i) shall affect the operation of any existing law in so far as it relates to or prevents the State from making any law relating to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow the State.

Clause (2) as amended in 1951 enables the legislature to impose restriction upon the freedom of speech and expression on certain grounds. They are—(1) Security of the State (2) Friendly relations with foreign States (3) Public order (4) Decency or morality (5) Contempt of Court (6) Defamation (7) Incitement to an offence.

As books and newspapers are the most potent means of expression of opinion and carry on open or hidden propaganda leading to incitement to an offence and as the other reasons for which restriction may be imposed on the freedom of speech and expression are partly Union subjects (e.g. Security of the State or friendly relations with foreign States) and partly State subjects (e.g. public order), books, newspaper and printing presses have been rightly made concurrent subjects.

Entry 40 makes "Archaeological sites and remains other than those declared by Parliament by law to be of national importance," concurrent subject. This is to be read with Entry 67 of List 1 which makes archaeological remains and sites of national importance, subjects for legislation by the Parliament. Entry 41 of List 3 mentions evacuee property and entry 42 the principles of compensation for property acquired or requisitioned for the purpose of the Union or a State. Entry 32 of List 1 and 36 of List 2 give the Union and the State respectively the right of compulsory acquisition of property for State purpose or public purpose. Payment of compensation for the same has been made

a concurrent subject so that if the unit fails to make proper provision for compensation, the Union may interfere and settle it in the interest of the party concerned.

Entry 43 mentions recovery in a State of taxes and arrears in land revenue arising outside the State. Thus the State has every right to recover its arrears but if the issue extends beyond the boundary of the State, the State may fail to enforce its law and then the Union may come to its relief. So it has rightly been made a concurrent subject. Entry 44 mentions Stamp duties other than duties or fees collected by means of judicial stamps, but does not include rates of Stamp duties. Of the few financial resources which are made concurrent, stamp duty is one but there are two exceptions. One is duties or fees collected by means of judicial stamps. Entry 77 of List 1 gives the Parliament the power to pass law with regard to the fees taken in the Supreme Court. Entry 3 of List II gives the State legislatures power to legislate with regard to "fees taken in all courts except the Supreme court."

So though judicial stamps and duties are not concurrent subjects, yet judicial stamps and duties in relation to different courts have been divided between the Centre and the Units. In relation to non-judicial stamp again, the rates of stamp duties is not made a concurrent subject. Entry 91 of List 1 gives the Centre power to legislate over the rates of stamp duty in respect of Bills of exchange, cheques, promissory notes etc. and Entry 63 of List II gives the State legislatures power to legislate with regard to rates of stamp duty in respect of documents other than those specified in List 1. So rates of stamp duty in general are not made a concurrent subject but a specified portion of the power is given to the Centre and another specified portion to the States.

Entries 45, 46 and 47 deal in general with enforcement of the entries in the List, entry 45 referring to enquiries and statistics for the purposes of any of the matters specified in List II or III. So the Centre is given the power to make enquiries and collect statistics not only with regard to the matters in List III but in List II also. Entry 46 of List III mentions jurisdiction and powers of all courts, except the Supreme Court with respect to any of the matters in this List. This also extends the power of the Centre for the Centre is given power over the Supreme

Court by entry 77 of List I and the present entry gives it power over other courts also. But there is a limit to the power of the Centre. That is, its jurisdiction over other courts is confined to matters in List III. By entry 47, fees in respect of any of the matters in this List but not including fees taken in any court is made a concurrent subject. Elaborate financial division of power has been made in the Constitution in order to avoid litigation but here is one of the two entries (the other being entry 44) which makes a financial power concurrent. Entry 96 of List I and 66 of List II give the Centre and the State respectively analogous power in exactly the same terms. In fact when so many subjects are made concurrent, fees in respect of them should also be made concurrent. Otherwise the powers given would be mere theoretical power.

With regard to the necessity of the concurrent list, the Joint Parliamentary Committee on Indian Constitutional Reforms 1933-1934 said in paragraph 51 that, "Experience has shown both in India and elsewhere, that there are certain matters which cannot be allocated exclusively either to a Central or to a Provincial Legislature, and for which, though it is often desirable that Provincial legislation should make provision, it is equally necessary that the Central legislature should also have a legislative jurisdiction, to enable it in some cases to secure uniformity in the main principles of law throughout the country, in others to guide and encourage provincial efforts, and in others again to provide remedies for mischiefs arising in the provincial sphere but extending or liable to extend beyond the boundaries of a single province....

It would in our view be disastrous if the uniformity of law which the Indian Codes provide were destroyed or whittled away by the uncoordinated action of Provincial legislatures. On the other hand, local conditions necessarily vary from province to province, and Provincial legislatures ought to have the power of adapting general legislation of this kind to meet the particular circumstances of a Province."[1]

It is true that the provision for the concurrent list increases the chances of litigation for it gives power over the same subjects

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[1] Joint Parliamentary Committee on Indian Constitutional Reforms 1933-34 Para 51. (Vol I. Part I)

to both the authorities. One of the purposes of so elaborately enumerating the items for legislation was to avoid litigation and to reduce controversy to the minimum. But the concurrent list was needed in the Government of India Act 1935 to allay the fears of the Muslim Leaguers that a strong Hindu Centre might dominate over the Muslims in the Hindu majority States. It has been maintained in the Constitution as a concession to the sentiment of the erstwhile autonomous Provinces and the semi-sovereign States. The Centre also was being newly constituted for the federal portion of the Government of India Act was never put to practice. So the concurrent list left a possibility that in case the Centre failed to organise uniform legislation or efficient administration, the Provinces also would have some control over the matters enumerated in the concurrent list. Moreover the Provinces may begin experiments in some of the subjects enumerated in List III which, if successful, can be taken over by the Centre and applied to all the units in general. Whatever may be said against the concurrent List, it at least refutes the arguments of those who try to prove that the Centre is over-powerful in the Indian Constitution for here are 47 items with respect to which the Provinces have concurrent power with the Centre. Not only that, when there are laws passed on the same subjects by both the authorities, the State law may prevail over an earlier law passed by the Parliament with the consent of the President of India. So though the residuary powers are given to the Centre, yet we can say that the evil effect of that is counter-balanced both by the elaborate enumeration of division of legislative powers in the body of the constitution and the provision for the concurrent list, which gives both the States with their local knowledge and initiative and the Centre with its breadth of vision and co-ordinating capacity enough scope to exercise a balancing power over one another.

CHAPTRE XI | DIVISION OF FINANCIAL POWERS BETWEEN THE CENTRE AND THE STATES

Financial Integration of the States :

The whole of the economic structure of India has undergone a revolutionary change with the attainment of independence and the integration of the Indian States into the Union of India.

The entrance of the former Indian States into the Indian Federation has made the allocation of revenues and the distribution of grants-in-aid easier. Upto 15th August 1947, the British Indian Provinces and the Indian States had developed on different lines. Both were under the Governor-General-in-Council, before 1935. But after 1935 the British Indian Provinces remained under the Governor-General-in-Council while the States came under the Crown Representative, who exercised undefined powers under Paramountcy. The geographical unity of India was, however, an undeniable fact and many matters were of common concern, the main among them being defence, communication, economic and fiscal relations. Due to the necessity of concerted and coordinated action in these matters of common concern, various codes and agreements developed between the Government of India and the States. But Section 7 of the Indian Independence Act brought about the lapse of paramountcy of His Majesty over the Indian States. This created a void and it was felt all over India (both in the former British Indian Provinces and in the former Indian States) that the tie could not be severed. What followed is a well-known fact. Due to the untiring zeal of Sardar Patel, almost all the States with the exception of Hyderabad, Kashmir and Junagadh acceded to the Indian Dominion over a limited number of subjects viz. Defence, External Affairs and Communication from 15th August 1947. The Codes and Agreements were all preserved by the Standstill Agreements which were executed by the Rulers. The States thus came within a definite constitutional relationship with the Central Government in India.

Then the Constituent Assembly appointed an Expert Committee under the presidentship of Late Nalini Ranjan Sarkar. Its report

was published in December 1947. The Sarkar Committee recommended that the States should prepare periodical budgets, maintain audit and account, and send copise of the same to the Central Government. It also recommended that internal customs barriers should be abolished and thus tariff walls should disappear for which no compensation should be paid to the State Governments. But the administration of maritime customs should be taken over by the Central Government with the payment of compensation. The Central excise and the Indian Income Tax should be applied to the States and suitable compensation should be given to the States for the loss of privileges and immunities which were enjoyed by them. Subsequently Union of States approximating in size to the former British Indian Provinces came into existence. They were Saurashtra, Madhya Bharat, Vindhya Pradesh, PEPSU, Rajasthan and Travancore-Cochin.....When the Madhya Bharat Union was being formed, a mandatory provision was introduced in the Covenant that by the Instrument of Accession the Union should accede with respect to all matters in List I and III of the Seventh Schedule of the Constitution of India, excepting those relating to any tax or duty. This Union was inaugurated on 28th May 1948. Subsequently other Unions also accepted the provision of accession on all subjects except finance or taxation.

In fact the Rulers were reluctant to part with their financial independence. The unwillingness of the Rulers had presented a stumbling block to the federation contemplated in the Government of India Act 1935. Grown wiser with the experience of the past, the State Ministry allowed the Indian States to accede on other subjects without any financial commitment. But this State of things was not at all satisfactory and could not be allowed to continue. As the States acceded on all subjects in the two lists (excepting finance), the very basis on which the Sarkar Committee made their recommendation changed. The States acceded on almost all subjects and there was no more any question of the retention of their sovereignty and independence. So the whole question of financial relation between the States and the Union of India was to be reconsidered. In order to go anew into this question, the Government of India (Ministry of States) passed a Resolution on 22nd October, 1948 and Indian States Finance Enquiry Committee was appointed with Shree V. T. Krishna-

machari as its chairman. The States were unwilling to part with the expanding revenue of income and excise. The Krishnamachari Committee convinced the Rulers that "The essential points in the new relationship are that there shall be a Union of India in which provinces and States shall be equal partners and in which all power and authority are derived from the people.....

".....From the concept of States and Provinces as equal partners, it inevitably follows that the Central Government should function in States over the same range of subjects and with the same powers as in Provinces. It is only in this way that the Union of India will gain in strength and its policies in effectiveness. There is no federation in which the Central Government possesses different levels of power and authority in the units comprised in it."[1]

The Committee further stated that it was only on the basis of complete equality of contribution to the federal fisc that the Provinces and the States could share the common services run by the Central government.

The Committee said that the federal financial integration involved a two-fold process. The first was a financial partition between the federal portion and the State portion of the functions previously discharged by the States. The second was the merger of the federal portion of the State functions with that of the Central Government in India. A new Indian Union would thus be formed, in which all the federal resources of both the Provinces and the States would be brought together for administrative convenience. It would not be a taking over of the State resources by the rest of India and hence there would be no question of payment of compensation by one part of India to another. Simultaneously, however, in order to allay the fears of the State Governments that financial integration would upset their budget, a transitional scheme of financial assistance was made.

The committee mentioned certain principles on which the new relation between the States and the Union of India should rest. These were :—

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[1] Report of the Indian States' Finance Enquiry Committee 1948-49 paragraph 10-11.

(*i*) The Union Government should have authority in the States over the same range of subjects as in the Provinces.

(*ii*) The Union Governemnt should exercise its functions in the States through its own administrative agencies as in the Provinces.

(*iii*) The States should contribute to the finances of the Union on exactly the same basis as the Provinces and receive grants and other forms of financial assistance on the same basis.

The committee recommended the introduction of Income Tax in all the units of the Union and the abolition of Customs barrier. It also assured the States that the loss accruing from the abolition would be made good by the proceeds of the Sales Tax which would be introduced in the States. They recommended that the integration of all federal taxes, duties and revenues including railway, post and telegraph and currency should be completed from the very beginning. In order to compensate for the loss accruing from this integration, grants-in-aid would be paid to the States.

Summing up the advantages which would be enjoyed by the States in the new set-up, the Indian Finance Enquiry Committee said :—"The States themselves will also derive substantial advantages among which the following may be mentioned :—

Firstly, their people and Governments will take their place in the polity of India alongside of the people and Governments in the rest of India and share in its wider life with equal rights and obligations. Secondly, administrative standards and efficiency will increase by closer contacts with the administration of the Central Government and especially by the uniform accounting and audit system which will result from the supervision of the Auditor-General of India, recruitment to the higher services on an all India basis, a unified judicial system and access to technical advice and assistance furnished by the Central Government. Thirdly, States will have their share of such federal revenues as may be made divisible from time to time and of grants, loans and other forms of financial assistance given by the Centre, on the same basis as Provinces ; an impetus will thus be given to development programmes in these areas."[2]

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[2] Report of the Indian States Finance Enquiry Committee, 1948-49 para 15.

They also stated that there would be uniformity of law and administration all over India, tax evasion would be reduced, abolition of tariff walls would result in the freedom of trade. Ports and other important links in the country's system of communications would be free to serve the national hinterlands. National and regional economic planning would be possible on all India basis.

In the meantime the Draft Constitution of India went through its second reading in the Constituent Assembly. The States Ministry decided that in the future Union of India the States and the Union of States should be brought in line with the Provinces on practically the same basis. Thus the various Agreements executed and ratified by the States and the Union of States, were embodied under Articles of the Constitution.

The financial integration of the States with the Union of India took place from the beginning of the financial year 1950-51. According to the recommendations of the Krishnamachari Committee there was a uniform application of federal taxes to these States. The administration of railways, posts, telegraph, audit, account, currency, coinage and mints of these States and Union of States, was taken over by the Government of India on 1st April, 1950.

The States thus came within the Constitutional set-up for the first time in the history of India and the allocation of revenue between the Centre and the States (that is to say, both the former British Indian Provinces and the former Indian States) became an easier task.

But before we start with the Constitutional provisions with regard to the distribution of revenue, we must take note of the fact that the whole of the map of India changed later due to the Reorganization of States. In 1950 after the sovereign and independent Republic of India came into existence and the Indian States had been integrated in the Union of India, four different types of States emerged. There were those States which merged with the neighbouring Provinces to become part of what came to be called Part A States. Secondly, there were those States which constituted the new centrally administered units and came to be known as Part C States. Then there were smaller States which combined to form the Union of States. Fourthly, there were the viable units which became the Part B States. But this disparate

status of the constituent units was a Constitutional anomaly detracting from the federal character of the Indian Constitution. Thus following the birth of the new State of Andhra, the States Re-organisation Commission was appointed in December, 1953. It submitted its report on 30th September, 1955. The decisions of the Government on the Report were embodied in three Acts, viz. The States Re-organisation Act, the Bihar and West Bengal (Transfer of Territories) Act and the Constitution (Seventh Amendment) Act.

A new India (from the point of view of political geography) emerged out of these changes. The only States unaffected by these changes were Assam, Orissa, Uttar Pradesh, Jammu and Kashmir. Following the recommendations of the States Re-organisation Commission, all the former Part C States now have been incorporated in the neighbouring big States.[3]

The rest of the former States excepting Jammu and Kashmir are of equal status and are called Part A States. Jammu and Kashmir for their special status have been grouped into Part B States.

II

A study of the Indian Constitution as it was before the amendment with regard to the Sales Tax, gives us the following picture of the sources of Revenue allocated to the States and the Union respectively.

The State resources of revenue

List II of the Seventh schedule to the Constitution mentions the taxes which are to be levied and collected by the States. They are—

1. Land revenue including the assessment and collection of the revenue (Entry 45).

2. Taxes on Agricultural income (Entry 46) ;

3. Duties in respect of succession to agricultural land (Entry 47).

4. Estate duty in respect of agricultural land (Entry 48).

5. Taxes on lands and buildings (Entry 49).

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3 States Reorganisation Commission Report, Paragraphs 246-287.

6. Taxes on mineral rights, subject to any limitation imposed by Parliament by law relating to mineral development (Entry 50).

7. Duties of excise on the following goods manufactured or produced in the States and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :

(*a*) alcoholic liquors for human consumption.

(*b*) opium, Indian hemp, and other narcotic drugs and narcotics but not including medicinal and toilet preparations containing alcohol or any substance included in subparagraph (b) of this entry (Entry 51).

8. Taxes on the entry of goods into a local area for consumption, use and sale therein (Entry 52).

9. Taxes on the consumption or sale of electricity (Entry 53).

10. Taxes on the sale or purchase of goods other than newspapers (Entry 54).

11. Taxes on advertisements other than those published in the newspapers (Entry 55).

12. Taxes on goods and passengers carried by road, or inland waterways (Entry 56).

13. Taxes on vehicles, whether mechanically propelled or not suitable for use on roads, including tramcars subject to provisions of Entry 35 of List III (i.e. the concurrent list) (Entry 57).

14. Taxes on animals and boats. (Entry 58).

15. Tolls (Entry 59).

16. Taxes on professions, trades, callings and employments (Entry 60).

17. Capitation taxes (Entry 61).

18. Taxes on luxuries including taxes on entertainments, amusements, betting and gambling (Entry 62).

19. Rates of Stamp duty in respect of documents other than those specified in the provisions of List—I, with regard to rates of Stamp duty (Entry 63).

20. Fees in respect of any of the matters in List II but not including fees taken in any court (Entry 66).

The principal items of revenue stated in the Union List are the following :—

1. Railways (Entry 22).

2. Post and telegraphs, telephones, wireless, broadcasting and other like forms of communication (Entry 31).

3. Property of the Union and revenue therefrom, but as regards property situated in a State specified in Part A or Part B of the First Schedule subject to legislation by the State save in so far as Parliament by law otherwise provides (Entry 32).

4. Public debt of the Union (Entry 35).

5. Currency, coinage and legal tender (Entry 36).

6. Foreign loans (Entry 37).

7. Reserve Bank of India (Entry 38).

8. Post Office Saving Bank (Entry 39).

9. Lotteries organised by the Government of India or the Government of a State (Entry 40).

10. Taxes on income other than agricultural income (Entry 82).

11. Duties of customs including export duties (Entry 83).

12. Duties of excise on tobacco and other goods manufactured or produced in India except—

(*a*) alcoholic liquors for human consumption ;

(*b*) opium, Indian hemp ; other narcotic drugs and narcotics but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry (Entry 84).

13. Corporation tax. (Entry 85).

14. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies ; taxes on the capital of companies. (Entry 86).

15. Estate duty in respect of property other than agricultural land (Entry 87).

16. Duties in respect of succession to property other than agricultural land (Entry 88).

17. Terminal taxes on goods or passengers carried by railways, sea or air ; taxes on the railway fares and freights (Entry 89).

18. Taxes other than stamp duties on transactions in stock exchanges and future markets (Entry 90).

19. Rates of Stamp duty in respect of bills of exchange, cheques, promissory notes, Bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts. (Entry 91).

20. Taxes on the sale or purchase of newspapers, and on advertisements published therein (Entry 92).

But before the sources of revenue were codified in the Constitution in List I and List II, there was a prolonged debate in the Union Powers Committee of the Constitutent Assembly over the items to be allocated to the two authorities. Speaking about the sources of revenue given to the States, Sir Ramaswami Mudaliar (Mysore State) said that, land revenue far from being an increasing asset would be a decreasing revenue in the future and with the abolition of zemindari, taxes on agricultural income, duties in respect of succession to agricultural land and estate duty in respect of agricultural land would be vanishing revenues. About taxes on lands and building, hearths and windows, he said that from these the local bodies and not the Provincial Government might profit. He also took objection to the fact that taxes on mineral rights were being given to the provinces subject to any limitation placed by Parliament. Shree Devi Prasad Khaitan (West Bengal) replied to all the criticisms of Ramaswami Mudaliar. He said that the immediate tenure holders take away all the income from land revenue and this is why the Provincial Governments are not benefitted by it. By either abolishing or purchasing the immediate tenure holders, the Provincial Governments would benefit more than they did at that time. By the same method the income of the Provincial Government from agricultural income, duty on agricultural land, and estate duty connected with it could be increased. Taxes on lands and buildings, hearths and windows, according to

Shree Khaitan could be profitable sources of income both for the Provincial Government and the local bodies.

About the next item he said, "Taxes on mineral rights, however insignificant they may have been in the past, will become a fruitful source of revenue to a large number of provinces when our mineral resources are developed and they will prove a source of great strength to the country as a whole."[4]

In fact Sir Ramaswami Mudaliar was taking objection to the power of Parliament to impose limitations on this tax. The fact is that iron, mica, manganese, copper and sulphur—all these minerals are of national importance and it would not be reasonable to give the States unconditional rights over this important item.

Next excise duties were discussed. Sir Ramaswami Mudaliar pointed out that under a mandate from the Centre, alcoholic liquor was being prohibited in most of the States, and opium was controlled not only by the Centre but also by international conferences. So it was bound to be a vanishing revenue.

It is true that excise on opium is a vanishing revenue. In 1953-54 the Taxation Enquiry Commission wrote :

"As a result of an International Convention, the export of opium for civilian consumption in foreign countries practically ceased in 1936 ; since then the only revenue under this head is derived from the sale of opium for internal consumption and sales abroad mainly for medicinal purposes."[5]

Under the Resolution of All India Opium Conference 1949, the consumption of opium except for scientific or medical purposes was to be prohibited. The production of opium is the monopoly of the Central Government and by imposing a ten per cent cut in the consumption, within a period of ten years, that is, after 1959, no opium was to be sold except for scientific or medical purposes. This has not only been a loss to the State Governments but the Central Government also lose much due to the reason mentioned by the Taxation Enquiry Committee 1953-54.

Moreover, the proceeds of the duties on tobacco and other goods manufactured in India, which have been given to the Centre

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[4] Constituent Assembly Debates Vol. V. No. 4, p. 97.

[5] Report of the Taxation Enquiry Commission 1953-54, Vol. 1, Chapter IX, para 18.

are not to be enjoyed by the Centre alone but they are shared duties, that is to say, the duties are to be levied and collected by the Centre but the proceeds of some of them (excepting those on medicinal and toilet preparation) are to be distributed between the Centre and the States. Excise duties on medicinal and toilet preparations are to be levied by the Centre, but collected and appropriated by the States.

With regard to State excise, it can be said that the excise policy has been one of temperance and restricting the consumption of intoxicating drink. But as yet complete Prohibition throughout India has not been enforced. It is simply one of the many Directives found in the Constitution and the Directives are being followed by legislation only gradually. So complete Prohibition will take a long time to come. As yet duties of excise on alcoholic liquor for human consumption form one of the major sources of revenue available to the State Governments.

Speaking about the cesses on the entry of goods into a local area for consumption or sale therein, Sir Ramaswami Mudaliar said that this was a sort of octroi. Hence it should not be introduced. According to him taxes on electricity also were not desirable as an attempt was being made to develop electricity in the Provinces and to establish industries with cheap electricity. But with the increasing use of electricity which has been made possible by the various River Valley schemes, this taxation will prove to be a fruitful source of income for the State Governments and this has been rightly included in entry 53 of List II. That electirity proves to be a fruitful source of non-tax revenue was admitted by the Taxation Enquiry Commission 1953-54. They said in their Report :—

"Of commercial enterprises (of the States) the most important are electricity undertakings, and road transport schemes, besides a few industrial undertakings in certain States. There is a noticeable trend in the States towards public ownership of the systems of generation and distribution of electricity ; besides the desirability of regulation of supply of a basic resource such as electricity, the promise of potential profit has increasingly led State policy in this direction."[6]

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[6] Report of the Taxation Enquiry Commission, 1953-54, paras 24-25.

Speaking about sales tax, that is, taxes on the sale and purchase of goods other than newspapers and advertisements other than those published in newspapers, Sir Ramaswami said that this was the only tax which was being exploited. "But I venture to say that there is a limit even to this taxation. . . . You will be killing the goose if you merely go on increasing the sales tax. The law of diminishing returns is bound to operate as in the case of tariff on imported goods."[7]

Entry 54 of List II mentions "Taxes on the sale or purchase of goods other than newspapers." It was amended by the Sixth Amendment to the Constitution in 1956. The Amendment added a new Entry to the Union List. This was Entry 92A. It says, "Taxes on the sale or purchase of goods other than newspapers where such sale or purchase takes place in course of inter-State trade or Commerce." Analogous to this we find an amendment in the State List as follows "54-Taxes on the sale or purchase of goods other than newspapers subject to the provisions of Entry 92 A of List I." Though this amendment seems to put a limitation upon the powers of the State Government, really speaking, it has been done in the interest of inter-State trade and Commerce, which was one of the reasons of abolishing the tariff wall maintained by the former Indian States. In order to understand the reason of the Sixth Amendment, we have to go deeper into the impact of sales tax on the various dealers living in the different States and the difficulties experienced in inter-State sales. We propose to deal with it in a later section of this chapter.

Sir Ramaswami's criticism of the next few items seems to be justifiable. He said that it is difficult to have any substantial revenue from taxes on goods and passangers carried by road or inland waterways. Also taxes on vehicles are meant mainly for the local bodies and "with strong pressure from agricultural and rural areas which is bound to be exerted in the legislatures, it will not be possible to tax animals and boats."[8]

About tolls he said, "It will be very difficult to revive that dismal system of hold-ups which has been the feature in the past in many of the cities of our country."[9]

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[7] Constituent Assembly Debates, Vol. V. No. 4, p. 87.
[8] Constituent Assembly Debates, Vol. V. No. 4, p. 87.
[9] Constituent Assembly Debates, Vol. V. No. 4, p. 88.

Taxes on profession and calling, according to him, would be fit for local bodies alone and capitation tax would be like reviving the zezia system again. Most of these criticisms are just though taxes on professions and callings, if properly utilised can yield enough revenue to be shared between the Provinces and the local bodies. Then taxes on luxuries including exntertainment, amusements, betting and gambling were discussed. Sir Ramaswami Mudaliar criticized this proposed tax also. He said, "Here again betting and gambling are sought to be abolished by Provincial ministries. At any rate public opinion is supposed to be in favour of the abolition of betting and gambling. . . . And taxes on entertainment ! Let me tell you that life is rather dull in most of the areas of the Federation and I do not know whether any heavy taxation of so-called luxuries will really ensure the happiness of the ordinary men who, instead of going to the toddy shop for a diversion now goes to the cinema."[10]

But this apprehension of Sir Ramaswami seems to be unwarranted. We find that multifarious taxation has been imposed on cinema viz. Central Government taxes on the import of raw films, import of cinematograph equipments, fees for storage of films, and State taxation like entertainment tax, sales tax, licence fees for operating cinemas and electricity tax. Yet the number of films produced in India has now reached an annual average of 250 to 280 and the daily attendance of cinema houses is two millions in the average.[11]

Sir Ramaswami paid too much attention to the taxes which have been exclusively given to the States. There were other categories of revenues in which the States would have a share. First among them were the duties which would be levied by the Union but collected and appropriated by the States. Article 268 provides for this when it says,

"(1) Such stamp duties and such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied by the Government of India but shall be collected ;

(a) In the case where such duties are leviable within any State specified in Part C of the First Schedule, by the Government of India and

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[10] Constituent Assembly Debates, Vol. V. No. 4, p. 88.
[11] Hindusthan Year Book, 1959, pp. 528-533.

(b) In other cases by the States within which such duties are respectively leviable.

Item 84 of the Union List gives the Centre power over duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption ;

(b) opium, Indian hemp and other narcotic drugs and narcotics but including medicinal and toilet preparations containing alcohol or any substance included in sub paragraph (b) of the entry."

Article 269 provides for a second category of Centre controlled taxation to be enjoyed by the States. They are taxes levied and collected by the Union but assigned to the States according to the Rules formulated by Parliament by law. They are :

(a) duties in respect of succession to property other than agricultural land ;

(b) estate duty in respect of property other than agricultural land ;

(c) terminal taxes on goods and passangers carried by railway, sea or air ;

(d) taxes on railway fares and freights ;

(e) taxes other than stamp duties on transactions in stock exchanges and future markets ;

(f) taxes on the sale or purchase of newspapers and on advertisements published therein.

The taxes specified in Article 268(1) are to be levied by the Union but collected by the States directly while taxes on the items in Article 269 are to be levied and collected by the Union but assigned to the States.

Article 270 provides for another category of taxation. It mentions that taxes on income other than agricultural income are to be levied and collected by the Government of India but distributed between the Union and the States, in such manner

and from such time as may be prescribed by Order of the President until a Finance Commission has been constituted. After the Finance Commission has been constituted, it will be prescribed by the President by Order after consulting the recommendations of the Commission.

In fact the most important change regarding the allocation of finance has been made with regard to income tax, jute export duty, sales tax and salt tax. The President promulgated a Distribution of Revenue Order in 1950 which fixed the percentage of taxes on income for the States at 50 per cent. The Parliament passed the Finance Commission (Miscellaneous) Act in 1951 and the Commission was set up on 16th October 1951. Among the main recommendations of the Commission, we find an increase in the percentage from 50 to 55 of the net proceeds of the income tax to be assigned to the States.

It laid down, "Under Article 270 of the Constitution—

(a) the percentage of the net proceeds in any financial year of taxes on income, other than agricultural income to be assigned to the States, should be fifty-five."[12]

This 55 per cent was to be distributed as follows :—

Assam 2·25 ; Bihar 9·75 ; Bombay 17·50 ; Hyderabad 4·50 ; Madhaya Bharat 1·75 ; Madhaya Pradesh 5·25 ; Madras 15·25 ; Mysore 2·25 ; Orissa 3·50 ; PEPSU 0·75 ; Punjab 3·25 ; Rajasthan 3·50 ; Saurashtra 1·00 ; Travancore Cochin 2·50 ; Uttar Pradesh 15·75 ; and West Bengal 11·25."[13] This was the position before the re-organisation of the States.

The principle which governed allocation was determined with reference to the relative collection of the States and the needs of the States as measured by the population of each State.

"We consider," said the Report, "that only a broad measure of need such as is given by the respective populations of the States is suitable for application in the distribution of the proceeds of a shared tax."[14]

"On a broad view of the position," continued the Report, "we propose that twenty per cent of the States' share of the

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[12] Report of the Finance Commission 1952. Chapter IX, para 1(a).
[13] *Ibid.*, para 1(c).
[14] *Ibid.*, Chapter IV, para 27.

divisible pool should be distributed among the States on the basis of the relative collections of the States and eighty per cent on the basis of their relative population according to the census of 1951."[15]

The Second Finance Commission which submitted its Report in 1957, felt that an increase from 55 per cent to 60 per cent in the States' share of income tax was justified. The Commission held the view that the actual basis of distribution should be population and not collection. It recommended the elimination of the factor of collection by stages and said that the States' share should be distributed to the newly organised States as follows :

Andhra Pradesh 8·12 ; Assam 2·44 ; Bihar 9·94 ; Bombay 15·97 ; Kerala 3·64 ; Madhya Pradesh 6·72 ; Madras 8·40 ; Mysore 5·14 ; Orissa 3·73 ; Punjab 4·24 ; Rajastahn 4·09 ; Uttar Pradesh 16·36 ; West Bengal 10·08 ; Jammu and Kashmir 1·13.

The noticeable feature in this apportionment is that the share in the proceeds of Bombay, Madras and West Bengal has decreased. In the case of Madras, of course, we find that the State has been reduced in size because of the fact that Kanara district, formerly a part of Madras, has now been included in Mysore and Malabar district has now been part of Kerala. In the case of Bombay and West Bengal, we see that their shares have been reduced inspite of the fact that their areas have increased by inclusion of parts of Hyderabad, Rajasthan and Madhaya Pradesh in the former case and part of Bihar in the latter case.

This reduction in the share of Bombay and West Bengal assumes greater importance when we remember that taxation on income is relatively much more important than other sources of revenue which accrue to the States. This is because income tax is a general tax as compared with other taxes like excise duty, estate duty, death duty and such other taxes.

Article 272 also mentions another item, taxes on which are to be levied and collected by the Union but the proceeds of which are to be distributed between the Union and the States. This is

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15 *Ibid.*, Chapter IV, para 29.

Union duties of excise other than those on medicinal and toilet preparations.

When the first Finance Commission was instituted, it submitted its Report to the President about the distribution of the Union excise duties though it was not specifically included within the Commission's term of reference. The Commission did not recommend the distribution of all the Union excise duties. Only excise duties on three items viz. tobacco including ciggars, cigarettes etc. matches and vegetable products were considered suitable for distribution. Forty per cent of the net proceeds of these taxes were recommended for distribution among the States. It was also suggested that certain States which did not levy any tax on tobacco and received compensation for the same, would now be free to levy such tax from April 1953. The Second Commission added a few more articles in the list of those on which excise duties should be shared between the Centre and the States. These were sugar, tea, coffee, paper, vegetable, non-essential oils and suggested that the share of the States in respect of tobacco, vegetable products and matches should be reduced to 25 per cent. This reduction would be compensated by the widening of the range of divisible duties and each State would receive a larger sum than they were receiving.

The Government of India Act 1935, provided for the allocation of 62½ per cent of the net proceeds of the export duty on jute and jute products, to the jute growing provinces. After partition considerable portion of jute growing areas was included in Pakistan and the Expert Committee on Financial provisions of the Union Constitution suggested that no share of the jute export duty should be given to the jute growing provinces but grants-in-aid should be given to the jute growing provinces in lieu of the duty for a transitional period. Article 273 of the Constitution provides for the payment of grants-in-aid out of the Consolidated Fund to the States of Assam, Bihar, Orissa and West Bengal. The amount was to be fixed by the President by Order in Council, before the appointment of a Finance Commission and after the commission was appointed it was to be decided by the President after taking into consideration the recommendations of the Commission. In November 1949 the Government of India invited Mr. Chintaman Deshmukh to give an award regarding

the distribution of income tax and about the grants-in-aid to the States. The Award was made at the close of January 1950 and remained in force until the recommendations of the First Finance Commission were available. The Deshmukh Award fixed the grants-in-aid to the concerned States in this way : West Bengal Rs. 105 lakhs, Assam Rs. 40 lakhs, Bihar Rs. 35 lakhs, and Orissa Rs. 5 lakhs. The First Finance Commission raised the amount to the following—West Bengal Rs. 150 lakhs, Assam Rs. 75 lakhs, Bihar 75 lakhs and Orissa 15 lakhs. The Second Finance Commission did not make any substantial change in the scheme of the grants-in-aid. The share of Assam and Orissa remained unaltered. There was only a slight alteration in the amount received by Bihar and West Bengal. The share of Bihar was reduced to 72·31 lakhs, and that of West Bengal was raised to Rs. 152·69 lakhs. This was done in view of the transfer of certain parts of Bihar to West Bengal. These grants were to cease automatically at the end of the financial year 1959-60.

The first Finance Commission made important recommendations regarding the principles which should govern grants-in-aid to the States. First among them was the attempt to meet the deficiency of State resources. Unconditional grants might be made to the States for this purpose with the idea that the State authorities would themselves allocate such grants among the competing interests according to their best judgment. The second principle should be to help in the development of projects and augment welfare service. The third principle on which grants-in-aid might be given was to develop some activities which would solve unemployment, and provide for social security. For the last two purposes conditional grants-in-aid might be given. Economy in expenditure and self help practised by the States were some other principles mentioned by the Commission, on which grants-in-aid were to be given. Equalising the standard of basic social service, helping States in beneficient social services like the spread of primary education, and reducing the burden or special obligation due to some event of national concern like partition —these might also be made motives for giving grants-in-aid. Keeping all these principles in view and also the fact that the recommendations of the Commission would make some new sources available to the States, the Finance Commission made their

recommendations about the grants-in-aid to be given to the different States. According to financial needs they divided the States into three categories (a) those which were not in need of assistance viz. Madras, Uttar Pradesh, Bihar, Madhya Pradesh, Hyderabad, Rajasthan, Madhya Bharat and PEPSU (b) those which were considered to be marginal cases viz. Bombay, West Bengal, Orissa and Saurashtra (c) those which were in immediate need of financial assistance viz. Punjab and Assam.

Among the States which were marginal cases the Commission did not recommend any grant, to Bombay as Bombay was thought to have a well developed economy. In view of its problem arising from partition, West Bengal had Rs. 80 lakhs. In view of its relatively backward territory and its relatively backward people, the grants-in-aid to Orissa was raised from Rs. 40 lakhs to Rs. 75 lakhs. Saurashtra had Rs. 40 lakhs and Punjab Rs. 125 lakhs. This was because the Commission felt that the budgetary needs of Punjab would not be met by the allocation of revenues by the Commission. The grants-in-aid to Assam was raised from Rs. 30 lakhs to Rs. 1 crore. For Mysore and Travancore Cochin the grants-in-aid recommended were Rs. 40 lakhs and Rs. 45 lakhs respectively. The idea was to help them maintain their progress.

In addition to this, special grants were given to certain States. The following was the recommendations of the Commission.

"The following further sums should be paid as grants-in-aid of the revenues of the States mentioned below under the substantive portion of Article 275(1) of the Constitution for the purpose of expanding primary education in the States."[16]

States	1953-54	1954-55	1955-56	1956-57
	(In lakhs of rupees)			
Bihar	41	51	69	83
Hyderabad	20	27	33	40
Madhya Bharat	9	12	15	18
Madhya Pradesh	25	33	42	50
Orissa	16	22	27	32
PEPSU	5	6	8	9
Punjab	14	19	23	28
Rajasthan	20	26	33	40

[16] Report of the Finance Commission 1952 Chapter IX Section V.

In Section VII of the Chapter, the Commission mentioned the fact that,

"The actual sums accruing by way of devolution of revenue will vary from year to year."17

The Second Finance Commission submitted its Report after the re-organisation of States. Speaking about grants-in-aid to the newly formed States which came into existence after re-organisation, the Second Finance Commission recommended the following amount during the five years beginning from 1957."18

State	1957-58	1958-59	1959-60	1960-61	1961-62
			(In lakhs of rupees)		
Andhra Pradesh	4.00	4.00	4.00	4.00	4.00
Assam	3.75	3.75	3.75	4.50	4.50
Bihar	3.50	3.50	3.50	4.25	4.25
Kerala	1.75	1.75	1.75	1.75	1.75
Madhya Pradesh	3.00	3.00	3.00	3.00	3.00
Mysore	6.00	6.00	6.00	6.00	6.00
Orissa	3.25	3.25	3.25	3.50	3.50
Punjab	2.25	2.25	2.25	2.25	2.25
Rajasthan	2.50	2.50	2.50	2.50	2.50
West Bengal	3.25	3.25	3.25	4.75	4.75
Jammu & Kashmir	3.00	3.00	3.00	3.00	3.00

The Commission provided for the total devolution of about Rs. 140 crores a year as against an average sum of Rs. 93 crores received by the States under the recommendation of the first Commission. In addition to this, the States were to receive their share of the new centrally levied tax on railway fares under Article 269. The opinion of the Commission was that the share of a State should be as near as possible on the basis of the net proceeds of the actual passangers who travel on railways within its limits. Since correct data of Statewise passangers was not available, the Commission had to base its recommendations on certain assumptions.

Now we come to the item which have been exclusively given to the Centre. Of these various sources of revenue Railways, Post and Telegraphs, Telephone, Wireless, Broad-casting and other like forms of communication have been rightly given to the Centre. As means of communication, both the railways and the postal

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17 *Ibid.*, Section VII (2).
18 Report of the Finance Commission, 1957 Para 198. Section IV.

departments are arteries of defence and their entire control beginning from the legislation about them upto the appropriation of the revenue accruing from them ought to go to the Centre. Since the integration of all Company managed railways, into a single, unified public undertaking, railways constitute the largest single source of non-tax revenues of the Central Government.

Railways thus come under the principal public enterprises of the Central Government. Other such enterprises are post and telegraph, broadcasting, opium, currency and mint.

The third item mentioned in our list of the Union sources of revenue viz. property of the Union and the revenue therefrom should be read along with Article 285 and Article 289 of the Constitution. Article 285 lays down that "(1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State."

Article 289 says, "(1) The property and income of a State shall be exempt from Union taxation."

As the federal government sets up a double set of authority, for its smooth functioning it is required that the property of one should be immune from taxation by another. This is a practice followed in the United States of America also. In order to provide for this, a whole body of law called the immunity of Instrumentalities has developed in the United States. Regarding the federal taxation power, the Supreme Court of the U.S.A. said in Union Pacific Railways vs. Mc. Shale 1874 that a State cannot tax the salaries of federal officers.

Currency, coinage and legal tender; foreign exchange, foreign loans, Reserve Bank of India, Post Office Savings Bank, Lotteries organised by the Government of India naturally come within the sphere of Central control. Excluding the last item all the others are required for the maintenance of financial stability of the country.

We have already discussed item 82 of the Union List viz. taxes on income other than agricultural income and have seen that proceeds of this tax are divided between the Federation and the units. In fact the Centre retains only a small share of this tax.

This partial retention of the income tax cannot raise any objection because the balancing of budget by the Provinces and elasticity of their revenue is no more important than the solvency of the Federation.

Duties of customs including export duties which constitute Entry 83 of List I of the Seventh Schedule are concerned with commerce with foreign nations and as such they fall within the sphere of the Federation which charges and controls that item and have it as one of the sources of its revenue.

It has already been mentioned that part of the proceeds of the next item viz. duties of excise, has been attributed to the States.

Coming to Corporation tax which forms Entry 85 of the Constitution, we find that the term "Corporation tax" has been defined in Article 366 of the Constitution. Clause 6 of this Article of the Constitution says,

"Corporation tax means any tax on income so far as that tax is payable by Companies and is a tax in the case of which the following conditions are fulfilled :—

(*a*) That it is not chargeable in respect of agricultural income ;

(*b*) That no deduction in respect of the tax paid by the Compaines is, by any enactments which may apply to the tax, authorised to be made from dividends payable by Companies to individuals ;

(*c*) That no provision exists for taking the tax so paid into account in computing for the purposes of Indian income tax the total income of individuals receiving such dividends, or in computing the Indian income tax payable by, or refundable to, such individuals."[19]

This tax is one of the elastic resources in the hands of the Central Government. Speaking about taxes on income other than agricultural income and corporation tax, Shree Devi Prasad Khaitan said in the debate of the Constituent Assembly,

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19 Constitution of India Article 366 Clause (6).

"I hope.....that there is nobody here who will say that taxes on income or corporation tax....can be assigned to the Provinces. If you do that, there will be race between different provinces as did happen in the case of certain States in America. Different rates of tax were levied in different States for the purpose of either attracting business to certain states and for preventing other States developing the same as well as for well developed States to get unduly more income from certain industrial concern, and other sources of income. It is therefore highly desirable that taxes on income and corporation tax should go to the Centre."[20]

Entry 86 of List 1 speaks of "taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies, taxes on the capital of companies".

Income from property is calculated for purpose of taxation on the basis of bonafide annual value. It was suggested to the Taxation Enquiry Commission that this national basis of computation of income should be abolished and the taxable income should be based on actual rental receipt minus actual outgoings. In their recommendation, the Commission said, "In most cases the adoption of the proposed basis would not involve any change in liability, in view of the departmental practice of treating the rent actually received by a landlord as equivalent to the annual value unless there are reasons to believe that it does not represent the actual state of affairs. Though no substantial change is likely to result in tax liability from the adoption of the proposal, the onus is likely in that case to shift to the Income tax officer to prove that the actual receipt does not represent the proceeds of a genuine rental.

"We also observe in this connection that most enactments governing local taxation also adopt a more or less similar definition of 'annual value'. It would, therefore, be an advantage if a closer co-ordination could be established, for the determination of 'Annual value' by these two sets of tax authorities. In dealing with taxation we have suggested the creation of a State wide agency for the assessment of property taxes on behalf of all the local bodies in a State. We recommend that, in States where such an agency has

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[20] Constituent Assembly Debates Vol. V. No. 4, p. 97.

been established, income tax authorities should normally adopt the same annual value as that determined for municipal assesment."[21]

Entry 87 and 88 mention Estate duty in respect of property other than agricultural land and duties in respect of succession to property other than agricultural land. These duties were recommended by the Taxation Enquiry Committee of 1924-25 but constitutional and other difficultues stood in the way of their introduction. Now under the Constitutional provision, the Estate Duty Act has been passed in 1953 and imposes a duty on property passing after the 15th October 1953.

The administration of the Estate Duty has been given to the Central board of Revenue and the Officers of the Income tax Department. Estate Duty plays a double role in the Indian fiscal system. It brings money to the federal fisc and at the same time slowly reduces the inequality in wealth.

The next few items mentioned in the Union List have already been discussed. They all come under Article 269. They are to be levied and collected by the Government of India but their proceeds are to be distributed among the States.

III

Now we come to a most important tax in the State List, sale tax—a tax which was described by Sir Ramaswami Mudaliar to be a goose laying golden eggs. The Indian States, Finance Enquiry Committee i.e. The Krishnamachari Committee also assured the Indian States before their financial integration that the loss accruing from the abolition of customs barrier would be made good from the proceeds of the Sale tax. A few years after the Constitution began to function, that is, in 1953-1954, the Taxation Enquiry Commission said, "The Sales tax now is not only among the largest single sources of revenue to the State Governments but is also a source which has shown the greatest possibility in terms of revenue yield."[22]

But there were certain confusions in the Constitutional provisions with regard to the sales tax, which prompted dealers from various States to lodge an appeal for centralisation of sales

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[21] Report of the Taxation Enquiry Commission 1953-54. Vol. II, Chapter III, para 74-75.

[22] Report of the Taxation Enquiry Commission, 1953-1954 para 4.

tax by Constitutional Amendment....This was naturally opposed by the States. In order to understand this controversy, we have to refer to the historical case between Bengal Immunity Company Limited vs. The State of Bihar which appeared before the Patna High Court in 1953 and went on appeal to the Supreme Court with the result that the Constitution was ultimately amended. The Bengal Immunity Company Limited is a corporate body in Calcutta manufacturing and selling biological products to buyers inside and outside West Bengal. In December 1951, the Superintendent of Commercial Taxes of Bihar sent a notice to the Bengal Immunity Company asking them to apply for registration and submit a return showing the sale of the previous year. The Company remonstrated saying that there was no liability to pay tax under the Bihar Sales Tax Act and the Company could not be lawfully required to be registered as dealer under the Bihar Sales Tax Act. The Bihar Sales Tax authority threatened them by saying that in case of their failure to register their names, the former would make assessment due to their best judgment. The Bengal Immunity Company asked from the Patna High Court a writ in the nature of certiorari or prohibition to quash the proceedings instituted by the Superintendent of Commercial Taxes. Justice Ramaswami in the Patna High Court said that the Sales Tax authority had sent the notice under Section 13 (5) of the Bihar Sales Tax which was not ultra vires but had been formulated under Article 286.

Now Article 286 laid down,

"(1) No law of a State shall impose or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(*a*) Outside the State ; or

(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation—For the purposes of sub-clause (a) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce. . . . . ."

The contention of the counsel for the plaintiff was that the Bihar Sales Tax Act was void as it authorised the imposition of sales tax by the State of Bihar on a dealer outside Bihar like the Bengal Immunity Company Limited. This violated the provision of Article 286 (2) which clearly prohibited the imposition of sales tax by State authorities on goods in inter-State trade or commerce.

But justice Ramaswami said that from Article 286 (2) an exception was made in the Explanation to Article 286 (a).

"The principle of construction is that from a large general clause must be excepted a particular clause which forms a branch or sub-division of the large clause. If no such exception is made, the danger would be that the more general clause will absorb or over-ride the particular clause."[23]

So he said that the small category of the sale of goods in which property passed in one State and the goods were actually delivered as a direct result of the sale and the purpose of consumption in another State should be considered to be an exception to inter-State trade and commerce. So the latter State might lawfully impose sales tax on such commodity.

The application was dismissed from the Patna High Court and went to the Supreme Court in 1955. The Supreme Court decided per majority,

"A legal fiction is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field. The Explanation created a legal fiction. Legal fictions are created only for some definite purpose. Here the avowed purpose of the Explanation is to explain what an outside sale referred to in sub-clause (a) is. The Explanation in Clause (1) (a) cannot be legitimately extended to Clause (2) either as an exception or as a

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[23] Justice Ramaswami in Bengal Immunity Company Limited *vs.* The State of Bihar. A.I.R. Patna 1953.

provise thereto and read as curtailing or limiting the ambit of Clause (2).

"Hence except in so far as Parliament may by law provide otherwise, no State law can impose or authorise the imposition of any tax on sales or purchases when such sales or purchases take place in the course of inter-State trade or commerce and irrespective of whether such sales or purchases do or do not fall within the Explanation."[24]

In order to examine the incidence of Central, State and local taxation, on the various classes of people and in different States and to examine the stability of the prevailing system of taxation, a Taxation Enquiry Commission was instituted in 1953-1954 with Dr. John Mathai as its chairman. They said that the future of sales tax demanded decisions on major issues of policy. As States sought to recover their tax from the non-resident dealers, who delivered goods for consumption within their territories, the Sales tax became a subject of complaint by trade and industry. Interests representing trade, industries and commerce, demanded that sales tax should be centrally administered. The States strongly protested against this as sales tax was a source of greatest flexibility in terms of revenue yield. The Commission expressed its opinion that the idea of centralisation of Sales Tax must be ruled out if only on the ground that it was inconsistent with the preservation of this elasticity.

Then they suggested certain considerations of policy as the basis for the future development of Sales Tax. These were that in essence, the Sales tax must continue to be a State tax and as a source of revenue, it must wholly belong to the States ; and as a tax to be levied and administered, it must substantially pertain to the State Governments. Then they recommended that the sphere of power and responsibility of the State might be said to end and that of the Union to begin, when the Sales tax of one State impinged administratively on the dealers and fiscally on the consumers of another State. Broadly speaking, inter-State sale should be the concern of the Union. According to their recommendations the Constitution (The Sixth Amendment) Act, 1956

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[24] Bengal Immunity Company Limited *vs.* The State of Bihar in the Supreme Court A.I.R. 1955.

brought about an amendment to the Lists I and 2 of the Seventh Schedule to the Constitution.

Entry 92 in List I of the Seventh Schedule was "Taxes on the sale or purchase of newspapers and on advertisements published therein. . . ."

A new entry called Entry 92A was added after it which reads as follows :

"Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade and commerce."

In List II Entry 54 originally read as follows :

"Taxes on the sale or purchase of goods other than newspapers".

Few words were added after it and the amended Entry reads as follows :

"Taxes on the sale or purchase of goods other than newspapers subject to the provisions of Entry 92A of List 1"

It also amends Article 286. The Explanation of Article 286, which gave rise to so much controversy in the case of the Bengal Immunity Company Limited, has been omitted. Clause (2) of Article 286 originally read as follows :

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter State trade or commerce."

For this Clause the Sixth amendment provides a new Clause which reads as follows :

"(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in Clause (1)".

Clause (3) of Article 286 originally read as follows : "(3) No law made by the Legislature of a State imposing, or authorising

the imposition of a tax on the sale or purchase of any such goods as has been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

This was amended as follows :

"Any law of a State, so far as it imposes, or authorises the imposition of a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

According to this amendment the Central Government shall levy and collect taxes on the sale and purchase of goods other than newspapers where such sale or purchase takes place in course of inter-State trade or commerce. But the proceeds of such taxes shall be distributed among the States in whose territory the tax will be levied and collected.

The States here are losers in a sense because they cannot now impose tax on outside dealers but in another sense, they are gainers as they are to receive the proceeds of the taxes levied by the Central Government. Moreover, the taxes on the essential goods which could not be levied without the consent of the President, can now be levied by the State Government within certain conditions imposed by the Parliament. The States, are thus not losing much in terms of revenue. The only thing is that part of the power wielded by them has been snatched-away. But all disputes about Centre—State relations have to adjust themselves to the practical necessity of the citizens of the State. Moreover the anomaly in the Constitutional provision was not only giving trouble to the individual businessman or traders Company by putting a hindrance to the free development of inter-State trade and commerce but the State authorities were in an anomalous position concerning jurisdiction of imposition of sales tax.

IV

As federation means dual authority in a country and each of the authorities has independent functions to perform, so each one of them should have independent source of revenue. This is the

surest way to prevent cramp in their normal activities. In fact, legislative equality is reduced to nullity without fiscal autonomy. So the ideal situation would be that in which both the Centre and the Units have completely independent sources of revenue. But like every other field of life, in Politics also the ideal is never achieved. As both the authorities have to deal with the same set of people, the rigid application of the federal principle is nowhere possible. So the basis of distribution of finance differs from federation to federation. Article I Section VIII of the United States Constitution gives the Congress power to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States. The only restriction put to this power is that all duties, imposts and excise will have to be uniform throughout the United States. It has also the power to borrow money on the credit of the United States. Amendment XVI gives the Congress power to levy and collect taxes on income from whatever sources derived, without apportionment among the several States. In Canada, the Union Parliament has the power to raise money by any mode or system of taxation and to borrow money on public credit. In Australia there is no limit at all to the power of taxation by the Centre, excepting that it shall not discriminate between State and State. In regard to excise and customs, the power in the Commonwealth is exclusive, though in regard to other subjects of taxation, the Commonwealth has concurrent power of taxation.

In India two exhaustive lists have been made to provide for the allocation of resources but besides them, several Articles in the body of the Constitution also refer to the same subject. Yet according to some, the sources of revenue given to the Units are not sufficient to meet the grave, acute and difficult economic problems which they have to face. Their contention is that the nation-building activities are the charges of the Units just as Defence is of the Centre. Hence the units should not be starved to overfeed the centre. In fact the Constitution—makers themselves felt that the retention by the Federation of the proceeds of all the taxes specified by them for the Centre, would in some cases violently disturb the financial stability of the units. This is why they recommended that provision should be made for

assignment or sharing of the proceeds of some of these taxes on a basis to be determined by the Federation from time to time. Besides the sources of revenue in List II of the Seventh Schedule, there are duties which are only levied by the Union but collected and appropriated by the States. Among them we find important duties like stamp duties and excise duties. It is an undeniable fact that the need for uniformity led the Constitution-makers to empower the Union to levy these taxes but the proceeds of these taxes will be fully enjoyed by the States. Then there are important duties like the duties on succession to property other than agricultural land, estate duty on such property. These are both levied and collected by the Union but appropriated by the States. Then there is the third category of taxation—the most profitable one, the tax on income which unlike the United States, is to be shared between the centre and the State. If inspite of all these sources, the units are still in need of money, the Constitution provides for three types of grants-in-aid, grants to the jute producing areas in lieu of jute export duty, the general grant in aid of the deficiency in a province, and grants for enhancing the speed of social and educational development in an unit. These provisions mean that the States need not be in constant need of money. Yet if there is any injustice or oversight due to the cropping up of some unexpected circumstances, the Constitution provides for the establishment of Finance Commissions, the first one within two years of the inauguration of the Constitution, and then at a regular interval of five years. The Constitution of India thus provides a novel solution of all the probable difficulties which may arise in connection with the distribution of financial resources among the Centre and the units. It is a flexible method devised to solve the problem of appoplexy at the Centre and anaemia at the units.

In the period of financial emergency, of course, the States will have no other resources than those contained in the State List for the President may, while the Proclamation is in operation, suspend any of the provisions of the Constitution relating to the sharing of the Union taxes and grants. But we have to remember that emergencies do not occur every other day. In normal times the States have been given sufficient resources with which they are to perform their duties and develop their activities. It is

true that in the interest of uniformity, speedy collection and administrative efficiency, the Union has been made the levying and collecting authority in some cases but the States have not been deprived of the proceeds. In fact in some cases it is the Union which is deprived. In fact the distribution of Federal finance is a most difficult and complicated problem, because any theoretical consideration of fair and equitable distribution of resources has to adjust itself to the actual capacity of the people for paying taxes. Though there is a double authority to levy and collect taxes, it is after all an individual and a Corporation that are taxed and there is no unlimited scope of taxation. There is another factor which was pointed out by Shri Alladi Krishnaswami Ayyar in the Constituent Assembly Debates. This is that "The industrial, Commercial and agricultural economy of the country is so closely knit together that the taxation in one sphere must necessarily have its repurcussions on taxation in another sphere."[25] Bearing this in mind certain powers had to the given to the Centre for co-ordination and adjustment. The case with regard to Sales tax has clearly shown the danger of entrusting the States with too much power. After all the Constitution is for the individual and the groups in a State. If for their convenience it is required that we must deviate a little from theoretical perfection, it must be done. In fact there is no special sanctity in any theoretically perfect principle, be it that of democracy, be it that of a federation, if it is not ready to adjust itself to the needs of the moment. The provision for the Finance Commission shows that the members of the Constituent Assembly were not Constitutional diehards but were ready to modify their decision in the light of real circumstances. So much is the credit of the Constitution makers with regard to the allocation of resources between the Centre and the units.

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[25] Constituent Assembly Debates, Vol. V. No. 4, p. 73.

CHAPTER XII | DIVISION OF ADMINISTRATIVE POWERS BETWEEN THE CENTRE & THE STATES

Federation establishes a dual polity in a country and the two authorities are supposed to be co-equal and independent of each other. But there are several factors which bring the two into close relation with each other. First of all it is the same group of people to whom the legislative and financial policies of both the central and the unit Governments are applicable. Secondly, it is the same citizens who have to pay taxes both to the Central and State coffers. Thirdly, it is the Centre which is responsible for the peace, order and good government of the country. Then again defence is the sole charge of the Central Government. It is therefore natural that the Centre and the Units should come into contact with each other at various levels of administration also, and there should be Constitutional provision for bringing the administrative machinary of each into amicable relation with that of the other.

Administrative relation between the Centre and the Units as provided by the Indian Constitution can be examined under two headings :

(a) Emergency relations and (b) Relations in normal times.

(a) *Emergency relations*—During emergency period, the Central Government assumes full control over the units and the whole federation is switched off into a unitary system.

Articles 352-354 empower the President to make Proclamation of Emergency on the ground of war, external aggression, or internal disturbance. During the period of Emergency, the Union Executive and Legislature get wider powers to control affairs in a State.

Articles 356-357 empower the President to make a Proclamation and suspend the State Legislature and Executive and give their powers to the Centre when the Constitutional machinery in any State breaks down, or any State refuses to discharge its

Constitutional obligations. So during Emergencies, the Units become agents of the Centre.

(b) *Relations in normal times*—There are different methods and agencies by which the Centre exercises its control over the States in normal times. They are the following :

(a) Directions to the State Governments.

(b) Delegation of Union functions.

(c) All India Services.

(d) Grants-in-aid.

(a) Directions to the State Governments—Article 256 lays down, "The Executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State and the Executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose."

Article 257 lays down "(1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose."

Thus a Constitutional obligation is placed on the State Governments to ensure compliance with the laws made by Parliament and not to impede the exercise of the executive power of the Union. When both the provisions are taken together, they seem to widen the executive power of the Union and restrict both positively and negatively the executive power of the States. In a sense it breaks down the entire provision of division of powers between the Centre and the States because even within the sphere of List II of the Seventh Schedule, the States have to move cautiously so as not to impede with the exercise of the executive authority of the Union under List I or List III of the Seventh Schedule to the Constitution.

One concrete example may be given. It is that of Entry 13 of List II which loses much of its significance because of Article

257 (2). Entry 13 of List II gives the States power over "Communications, that is to say, roads, bridges, ferries and other means of communication not specified in List I ; municipal tramways ; ropeways ; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways ; vehicles other than mechanically propelled vehicles."

Now entries 22, 23, 24 and 25 of List I give the Centre power over the following :

22. Railways.

23. Highways declared by or under law made by Parliament to be national highways.

24. Shipping and navigation in inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels : the rule of the road on such waterways.

25. Maritime shipping and navigation....

The provision for communication is thus divided into two parts, one of them being given to the Centre and the other to the units, though communication generally speaking may be said to be a State subject.

This provision regarding communication has to be read along with Article 257 (2) which lays down,

"The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance."

The Union may thus either construct and maintain railways by themselves or give directions to the States to construct and maintain railways thereby affecting the utility of other means of communication. It may also declare any of the means of communication in the State List to be of national or military importance and give directions for their construction and maintenance. In a sense, this provision takes away from the States any authority with regard to the means of communication.

This plan of giving direction to the States has been borrowed from the Government of India Act 1935. The Joint Parliamentary Committee said in its Report :

"The Federal Legislature will have the power to enact legislation on federal subjects which will have the force of law in every Province and subject to such reservations as may be contained in the Ruler's Instrument of Accession, in every Indian State which is a member of the Federation.....The Legislature may devolve upon the Provincial Governments or their officers the duty of executing and administering the law on behalf of the Federal Government. The White Paper proposes that it shall be the duty of a Provincial Government so to exercise its executive power and authority.....as to secure that due effect is given within the Province to every Act of the Federal Legislature which applies to that Province. This.....is a statement of the Constitutional duty of every Province in relation to Federal laws, which has no sanction behind it other than the moral obligation which must always rest upon the constituent units of a Federation to give effect to the laws of the political organism of which they form a part. But in addition to the general statement of a moral obligation, the White Paper proposes to empower the Federal Government to give directions to a Provincial Government for the purpose of securing that due effect is given in the Province to any such law and that the manner in which the Provincial Government's executive power and authority are exercised in relation to the administration of the law is in harmony with the policy of the Federal Government."[1]

Following this, the Government of India Act of 1935 embodied the provision that the executive authority of every Province should be so exercised as not to impede with the exercise of the executive authority of the Federation and the executive authority of the Federation should extend to the giving of such directions to a Province which may appear to the Federal Government to be necessary for the purpose. It was one of the special responsibilities of the Governor to secure, "the execution of the orders or directions lawfully issued to him under Part VI (dealing with administrative relations between the Federation, Provinces and the States) of this Act by the Governor-General in his discretion."[2]

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[1] Report of the Joint Committee on Indian Constitutional Reform 1933-34, Vol. I, para 219.

[2] The Government of India Act 1935, Section 52, sub-section (1) para (g).

When the matter fell within the sphere of ministerial responsibility, the Governor-General was expected to consult the ministers. The position of the Governor would thus become unenviable because it would be quite possible for him to find his own ministers opposed to the course of action advocated by the Federal ministry. The only course left to the Governor would be to dismiss his ministry and enforce the order given by the Governor-General. This would seriously infringe upon the working of the Provincial Autonomy.

In the Constitution the provision for giving direction has been taken from the Act of 1935. But the means of enforcement has changed. Whereas in the Government of India Act 1935, compliance was sought through the Governor's special responsibility, in the Constitution Articles 356 and 365 provide for the sanction to the directions given by the Union executive to the State executive. Article 365 says,

"Where any State has failed to comply with or to give effect to any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution."

Article 356 says "(1) If the President, on the receipt of a report from the Governor or Rajpramukh of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in incordance with the provisions of the Constitution, the President may be Proclamation—

(a) Assume to himself all or any of the functions of the Government of the State....

(b) Declare that the powers of the legislature of the State shall be exercisable by or under the authority of the Parliament."

This provision for the Proclamation in case of the failure of the Constitutional machinery has been borrowed from the Government of India Act 1935. It is partly an improvement and partly a derogation from the provisions of Act, for Section 45 of the Act of 1935 empowered the Governor-General to deal with the failure of the Constitutional machinery in the Centre and Section 93

empowered the Governor to deal with the failure of the Constitutional machinery in the Province. In the Constitution there is no such provision about the Centre. But there is also another difference between the provision in the Government of India Act 1935 and that of the Constitution. While in the Government of India Act 1935 the Governor assumed the executive or legislatice powers of the Province, under the Constitution it is the President who will assume such powers with regard to a State. Thirdly, under the Government of India Act, the Governor could assume such powers while acting in his discretion while under the Constitution the President can do so only while acting on the advice of the Central ministry.

Thus the new provision enjoining upon the President to act on the advice of the Central ministry while assuming power over the States is a democratic step. Of course from the point of view of the federation, it appears to be a serious encroachment upon the powers of the States. But the saving grace in the situation is that it is a temporary provision and power is to be assumed by the President only when the Constitutional machinary fails and it is not possible to have the normal Parliamentary Government. The President's rule according to Article 356 was established in the Punjab when after the resignation of Dr. Gopichand Bhargava's ministry in 1951, no alternative ministry could be formed. The case of Punjab can be best explained in the language which Dr. A. K. Ghosal has used to explain the ministerial crisis in Orissa in May 1958.

"In England", the says, "when one ministry resigns, there is usually an opposition leader ready to form either a homogeneous or coalition ministry with the support of some other group or groups. But in the present case there was no such leader forthcoming who could undertake the responsibility of office and therefore the English precedent was not applicable."[3]

The same was the condition in the Punjab and on receiving the report from the Governor, the President had no other alternative but to proclaim emergency and he did so by promulgating two orders under Article 356.[4] The Governor thus became

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[3] Ghosal, A. K.: A critical Review of the Ministerial Tangle in Orissa, an article in the Modern Review, September 1958.

[4] Gazette of India, Extraordinary dated 20th June 1951, Part II, sec. 3.

the delegate of the Centre and temporarily assumed all local executive powers. But with the termination of the emergency, the Proclamation ceased to operate and normal Parliamentary Government was again established.

The second case of ministerial crisis occured in the neighbouring State of PEPSU, which was a Part B State at that time. Since the general election in 1952, no political party emerged in the State with a stable majority. The Congress Party had a membership of 26 in a House of 60 and so, as the leader of the largest single group in the House, the Congress leader, Col. Raghbir Singh formed a ministry in March 1952. In April there were some defections in the Congress rank. Thereupon Col. Raghbir Singh resigned and in his place Sardar Gyan Singh Rarewala formed a ministry on April 22nd 1952. Because of the shifting allegiance of members, after the budget meeting, the Assembly did not remain in session for more than seven days altogether. The second session of the Assembly was summoned on November 19, 1952. It was scheduled to last for ten days but was abruptly adjourned at the request of the leader of the House conveyed privately to the Speaker. The adjourned session was summoned again on December 22 and a "no confidence" motion against the Government was rejected by the fact that two members of the opposition crossed the floor and were sworn in as minister and Deputy Minister. The decision of the Election Commission was the last straw in the situation. The election of nine members including three ministers was set aside. Of these three, one was the Chief Minister. The Council of States consisted of six members and so by the decision of the Election Commission half the council was gone. The official statement on the PEPSU situation said,

"This political instability in the State Legislature has produced most harmful results in Administration. The Law and Order position had never been satisfactory in this State and it has considerably deteriorated still further. The whole executive administration has become weak. The effect on the morale of the Civil Services need not be emphasised. It is therefore absolutely necessary that sound administrative conditions should be restored and the people of the State should be given an early opportunity

to elect representatives of their choice in a free and impartial manner."[5]

Under these circumstances there was no other alternative for the President but to declare an emergency and assume power by a Proclamation. Mr. P. S. Rau, who was appointed adviser to the Rajpramukh, told the Pressmen,

"The rule of the President, which is of temporary character, is designed to put down violence and lawlessness at all costs, to re-instate the rule of law, to discourage communalism, to eradicate corruption in the public services and generally to restore the decencies of public life in the State."[6]

But new local elections were held soon and when the Congress Government came back to power, normal constitutional Government began to function again.

In November 1954, there was a constitutional crisis in the Andhra State. Mr. Prakasham's ministry, composed of the local Congress Party and a number of Independents, was defeated by an Opposition in the local Assembly. The Ministry resigned and the Opposition party approached the Governor for a mandate to form a new ministry. But the unwillingness of the Socialist Party to co-operate with the Communist Party made it impossible to form a stable government. The Prakasham ministry declared its unwillingness to carry on as a caretaker government until fresh elections were held. So a vacuum ensued and the President had to take over the administration of the State by the Proclamation of an emergency under Article 356.[7]

After a new local election, a coalition Ministry came into existence and President's rule came to an end.

The next instance of the Proclamation of Emergency occurred in Travancore Cochin in 1956, when the Government lost the support of the House and resigned. Then the President proclaimed emergency. The Congress Ministry continued to act as a caretaker Government until fresh election was held. As it was defeated in the new local election, it resigned in favour of the Praja Socialist Party which formed the Government.

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5 Official statement published in the Hindu, March 6, 1953.
6 The Hindu, March 12, 1953.
7 The Hindu, 9, 16 and 20th November, 1954.

Then we come to the unique case of Kerala. Kerala had a Communist Government which came into power after the general election of 1957. Its rule in general and particularly the passing of the Kerala Education Act, which restricted the power of appointment of the authorities in private educational institutions, led to the widespread opposition resulting in direct action against the Government. The combined opposition consisting of the Congress, P. S. P. and Catholic interests wanted that the Communist Government should resign and there should be fresh general election all over the State. But the Communists were unwilling to agree to this on the ground that they still had a majority in the legislature. There was no vote of no confidence against them and only the party in power had the prerogative to ask for dissolution of the legislature. So a spectacular drama of popular upsurge went on in Kerala.

The constitutional propriety of the agitation has been questioned by many thinkers. Condemning it on the eve of the Central intervention, the Manchester Guardian Weekly wrote,

"Now the democratic parties in Kerala have shown that even in a Republic with a central Government, pledged to maintain the rule of law, they prefer a short cut to their immediate political ends. If they do manage to bring down the Kerala Government, they will in the long run have suffered a worse defeat than if they call off the campaign. For what they have done any party will be able to attempt if it is defeated at the polls ; they have gone some way towards making elections a meaningless formality."[8]

But the National Herald wrote in its editorial of May 14th 1959, that the Communists could not talk of principles to other political parties, particularly the Congress because they had themselves observed none and worked only in patry interests.

The Kerala Government, according to the people of Kerala, abused its powers and the Kerala Pradesh Congress Committee prepared a charge sheet against it. There were 37 points in the charge sheet, the main among which said that the resources of the Communist Government were utilised for the Communist Party's interest, disregarding the rest of the population of the State. It was alleged that the Government dichotomised the

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[8] The Manchester Guardian Weekly, June 18th, 1959.

population of the State into Communists and non Communists and all opportunities were given to the first group to the exclusion of the second. The State Government abused the constitutional powers and there was no other way for the people to show their dissatisfaction with the Government than to rise in rebellion against it. For they could not go to the court against the Government as they could against a private party which violated the law.

West Bengal Youth and Students Committee presented the following argument in favour of the popular movement in Kerala :

"To deny the people their right to demand the resignation of a Government which has lost its popular support and to do so in the name of democracy is also a perversion. In the absence of the right of recall, the only alternative before the people is a popular agitation. A peaceful agitation to convince the head of the State that the majority in the legislature does not reflect the will of the people outside the legislature is strictly constitutional, especially when they cannot go to a court of law."[9]

Mr. Mungekar supported the movement in the following words,

"The crisis in Kerala arose out of matters which did not involve the breach of Constitution. In the last 2 years, large section of people there nursed a strong feeling of unfair dealing by the Government, and a layer upon layer of that had started piling up a few months after the Communist Ministry began its career. Later they grew in number, and seriousness and culminated into the charge sheet movement, which, together with the school closure movement and other campaigns against the Government, snowballed into the 'peoples upsurge."[10]

However, following the popular upsurge, the administration of the State was taken over by the Centre on 31st July 1959.

Opinions differ as to whether popular movement was the correct procedure to unlodge a Government from their seat of power. Dr. P. S. Muhar condemned it as unconstitutional and he posed a question, whether it would be sanctioned even by convention. This is what he has said,

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[9] The Kerala upsurge, a pamphlet published in July, 1959, p. 18.

[10] Mungekar, S.G.: Kerala, a Tale of Lost Opportunities, an article in the Modern Review, September, 1959.

"Should direct action against a Government be sanctioned by convention and be allowed to filter into the mores of Indian democracy ? It is true, that Gandhiji won us freedom through the employment of direct means. However, during the British regime, no other methods were open to us for the Supreme consummation of national freedom. The situation is fundamentally different now. It is open to a citizen to persuade other people to his point of view by sustained and honest efforts. Otherwise, we have a caricature of Satyagraha when people resort to Fast unto Death for trivial and even selfish purposes."[11]

Later on he truly says,

"The cases of central intervention in the Punjab, PEPSU, Andhra Pradesh and Travancore-Cochin provide no comparable cases, since in every one of them, the government had lost majority in the legislature. Central intervention, in other words, succeded and not perceded a breakdown."[12]

The constitutionality of the central intervention is thus a matter of controversy. But one thing is sure. Law and order had broken down in Kerala. The Centre having a different party in power, it is natural that it should be accused of supporting the people in their agitation against the government. The extent of the Centre's responsibility in the popular agitation is only a matter of conjecture but what is obvious is that after law and order had broken down in the State, there was no other alternative for the Centre but to intervene. There is no doubt that it is a suspension of the federal government but after all, it is a temporary affair and after the mid-term election in February 1960, the normal federal government has begun to work again.

If the ministry in a State belongs to the same party as the Centre, the situation may never become serious. But in the case of the Central Government and the State Governments hailing from different parties as in the case of Kerala, the situation may take a serious turn. Whether the situation will actually arise or not, is not the question. The very power given to the Centre by the Constitution is a potent instrument with which it may threaten the State Governments.

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[11] Muhar, P. S.: The Kerala Portent, an article published in the Bulletin of the Institute of Public Administration, Patna University, August, 1959.
[12] *Ibid.*

But we have mentioned one relieving feature in the situation, which is that the power assumed will be temporary. Secondly, the President will have to consult the Central ministry before declaring by Proclamation the failure of the constitutional machinary and the popular ministry at the Centre are not supposed to advise him to take a false step thereby destroying the division of powers envisaged in the Constitution. It is also to be remembered that emergencies do not occur every other day. In case of real emergencies, of course, the Centre will have to assume charge of the State machinary. But there is hardly any chance of false alarm being raised so long as the Central Ministry are to advise the President with regard to the power to be assumed. The danger is the least when both the Union and the State Ministry belong to the same party. In the case of the ministries belonging to different parties, if there is any disturbance, the verdict of the people, who are the political sovereign, will decide the issue.

Now we come to the second type of Centre—State relation in normal times. This is the delegation of Union functions. Article 258 lays down,

"(1) Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

"(3) Where by virtue of this Article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties."

This provision has been almost bodily lifted from Section 124 of the Act of 1935.

The Federation is here deputing the State executive to discharge certain functions in addition to their normal work. In such case it is in the fitness of things that the executive of the

units should be paid for the work done on behalf of the Union. It is just and fair that the principal should pay the agent. It is also true that the responsibility cannot be complete unless the Federation finds that its agent is carrying out its function with its own money.

(iii) The third way in which the Union is brought into administrative relation with the units is the All India Service. Article 312 says.

"Notwithstanding anything in Part XI, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more All India Services common to the Union and the States and subject to the other provisions of this Chapter, regulate the recruitment and the conditions of service of persons appointed to any such service.

"The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this Article."

One of the factors which has proved to be an asset to India after her Independence is "the Civil Service, the steel frame of India, which the Congrss, though formerly its critic was much too intelligent to destroy."[13]

As a dual polity, India requires a double set of public services. The Constitution has provided for this. But the Constitution also provides for the Indian Administrative Service and Indian Police Service which are common services to the Union and the States. As laid down in Article 312, Parliament is empowered to create more all India services.

Dr. Ambedkar said in the Constituent Assembly, "The dual polity which is inherent in a federal system is followed in all federations by a dual service. In all federations, there is a Federal Civil Service and a State Civil Service. The Indian Federation though a dual polity will have a dual service but with

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[13] Wint Guy : Spotlight on Asia, p. 130.

one exception. It is recognised that in every country, there are certain posts in its administrative set up which might be called strategic from the point of view of maintaining the standard of administration. There can be no doubt that the standard of administration depends upon the calibre of the civil servants, who are appointed to these strategic posts. The constitution provides that without depriving the States of their right to form their own civil services, there shall be an All India Service recruited on an all India basis with common qualifications, with uniform scales of pay and members of which alone could be appointed to these strategic posts throughout the Union."[14]

In the case of the older federations, the civil service of the federal government and that of the State government are separate, while in India, the former I. C. S. and the new I. A. S. are services common to the Centre and that units. It is a unique feature. The higher civil servants of the units are recruited by the Centre. This somewhat takes away the autonomy of the States. The units recruit only those civil servants who are at the lower rung of the ladder. This has been done for certain historical reasons. India was originally a unitary State. The I. C. S. was largely recruited from England. On the eve of independence the "Civil Servants, were asked whether they wanted to continue or not after the 15th of August 1947. Their conditions were guaranteed. Yet almost all European members of the Civil Service chose to bid good bye to India and the majority of the Muslim officers opted for Pakistan. Thus nearly 600 members of the Indian Civil Service left India, leaving about 400 officers to shoulder the burden of responsibilities in the new State."[15]

The reason for this choice is not far to seek. As the Government practically ceased to be bureaucratic, the high position of honour held by the Civil Service became a matter of the past, and most members of the I. C. S. thought it better to leave India.

"Since the transfer of power in 1947," writes N. C. Roy, "the government in this Country has technically ceased to be

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14 Constituent Assembly Debates. Vol. VII. No. 1 Motion re-Draft Constitution, p. 37.

15 Dubhasi P. R.: I.A.S.: A Decade of Administrative Change in India, an Article published in the Modern Review, February, 1959.

bureaucratic. The Indian Civil Service which was chiefly responsible for conducting the administration of this country for one hundred and fifty years exists today only as rump."[16]

The remaining few of the I. C. S. officers did not want to be put under the State Governments for reasons of salary and status. Thus a limited number of the Civil servants were left in India with whom to carry on administration and a Civil Service Common to the Centre and the units was created in addition to the separate services for the Centre and the units. This is because it was felt to be good to run the Secretariat for the Government at the Centre with persons having experience of the State administration and sending them back to the States after a period of three years or some such limited period. Although in practice a senior state officer who goes to a post in the Government of India as Secretary or any other capacity, tends to stay there as long as he can, yet the idea is to rotate the officers between the Centre and the Units. This system is to be appreciated not only because these officers may have experience both of the Central and the State Governments but also for the reasons that such a common service will be an unifying and centripetal administrative force in the country where there are so many disruptive forces unlike any other federation. Therefore, our federation has a rather unique administrative system.

The next administrative relation between the Centre and the units is brought about by grants-in-aid given by the Union to the States. This is provided for in Article 275. This Article says :

"(1) Such sums as Parliament may by law provide shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of such States as Parliament may determine to be in need of assistance and different sums may be fixed for different States."

This is a provision for general grant with no conditions imposed upon the States which receive such grants. Hence it does not involve any such control upon the States as in the case of the conditional grants. From the lenguage of this Article, it is clear that Parliament may discriminate between one State and

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[16] Roy, N. C.: The Civil Service in India (1958 edition) preface, p. xvii.

another while making grants. This is very natural as the deficit in one State need not be the same as the deficit in another.

In the second paragraph of the same Article, there is provision for conditional grant. It says :

"Provided that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of a State such capital and recurring sums as may be necessary to enable that State to meet the costs of such schemes of development as may be undertaken by the State with the approval of the Government of India for the purpose of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State."

So this is one of the conditional grants made in order to meet the expenditure of the schemes of development undertaken with the approval of the Government of India. This involves some control by the Union Government and hence can be compared with the delegation of the Union functions to the State Governments where the Union as the principal pays to the States for the discharge of delegated functions. The difference between the two sorts of provisions is that in the case of grants-in-aid for development projects, the initiative is taken by the States.

Clause (2) of Article 275 says,

"Until provision is made by Parliament under Clause (1) the powers conferred on Parliament under that clause shall be exercisable by the President by order and any order made by the President under this clause shall have effect subject to any provision so made by Parliament.

Provided that after a Finance Commission has been constituted, no order shall be made under this clause by the President except after considering the recommendations of the Finance Commission."

Speaking about U.S.A. where the Federal Government makes liberal grants to the States, in aid of agriculture, vocational education, Child and maternity welfare and sundry other things, D. D. Basu says,

"These grants are made subject to conditions and are followed by regulatory authority of the Federal Government. By these grants, the Federal Government has come to exercise a substantial control over the State Governments in recent years. It is a useful means of securing uniformity of action on the part of the States where that is necessary in the national interest even though the subject matter be legally within the State jurisdiction. By this means the nation seeks to remove the inequality of financial resources as between the States and the inability of weaker States to maintain the indispensable standards of national efficiency in matters of health, education and the like. The federal Government may require minimum standards and may insist on supervision of the State plans.....

Of course, Congress has no power to compel a State to accept federal aid. But a State which accepts such aid must accept it subject to the conditions imposed by Congress and to that extent surrender its power to manage its affairs in its own way. Federal aid has thus been a great centralising power."[17]

In India there are various ways in which the Federal Government controls the expenditure of the grants. First of all, there is a condition that the State plans and budgets should be previously approved by the Union. Secondly, there is a federal inspection of the work done. Thirdly, State accounts are audited by the Federal officers. Fourthly, the State Governments are to keep records of their expenditure and submit periodical accounts of it to the Federal Government. In case the State authorities fail to comply with these needs, the Federal aid may be withdrawn.

The need for money felt by the States is so urgent that far from refusing such conditional grants, they are ready to receive any aid from the Centre which may help them to tide over financial difficulties. Thus after the passing of the Constitution (Distribution of Revenues) Order 1950, the two Finance Commissions made recommendation for the devolution of huge amount of money viz. Rs. 93 crores (under the first Finance Commission) and Rs. 140 crores (under the second Finance Commission) respectively.

Article 293 provides for borrowing by the States. It lays down in Clauses (2) and (3).

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[17] Basu D. D.: *Op. cit.* p. 690.

"(2) The Government of India may, subject to such conditions as may be laid down by or under any law made by Parliament, make loans to any state, or so long as any limits fixed under Article 292 are not exceeded; give guarrantees in respect of loans raised by any State and sums required for the purposes of making such loans shall be charged on the Consolidated Fund of India.

"(3) A State may not without the consent of the Government of India raise any loan if there is still outstanding any part of a loan which has been made to the State by the Government of India or by its predecessor Government, or in respect of which a guarrantee has been given by the Government of India or by its predecessor Government....."

The limit to which Article 293 (2) refers is any limit fixed by Parliament by law. In respect of the borrowing power of States, one important change has been made from the Government of India Act 1935. The States cannot now borrow outside India.

Now whichever role the Government of India has to play, under this Article, whether that of lender or of giving guarrantee to a loan raised by the State, it will have substantial control over the manner of State expenditure. It is true in private as well as public life that he who pays the money shall call for the tune.

Inter-State Comity :

Federation necessarily involves the idea of the autonomy of the units but the idea of autonomy like the idea of any right as such is dependent upon its recognition by others. In a federation the recognition of this autonomy of the units means recognition not only by the Union but by the other units as well. As such every federation provides for the judicial determination of disputes between the units as also sometimes extra-judicial determination of disputes. A third method is also sometimes followed. This is the method of preventing disputes by previous consultation among the units. Article 131, Clause (c) mentions that the Supreme Court will have original jurisdiction in case of conflict between two or more States.

But Article 262 may be read as an exception to the provision of Article 131 (c). It (Article 262) lays down,

"(1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-state river or river valley.

(2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other Court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in Clause (1)".

The word adjudicate used in Article 262 (1) indicates that Parliament may authorise any court to decide dispute over inter-State river or river valley. As Article 131 (c) gives the general power of determination of disputes between two or more states to the Supreme court, this Article gives the Parliament the power to confer the right of adjudication to lower courts also and it does not exclude the jurisdiction of the Supreme Court. Clause (2) of Article 262 distinctly lays down that Parliament may by law prevent the Supreme Court from exercising its jurisdiction over disputes relating to inter State river or river valleys. So the three provisions Article 131 (c), 262 (1) and 262 (2) read together mean that the Supreme Court will have the general power of judging in cases of disputes between two or more States, but in the case of disputes relating to inter-State river or river valley, it depends upon the Parliament whether it will confer this power on the Supreme Court or any other Court or some extra judicial tribunal.

Article 265 provides for the establishment of a Council by the President at any time in case he feels that it is necessary in public interest to establish it. Such a Council will be charged with—

(a) inquiry into and advise upon disputes which may arise between States ;

(b) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States have a common interest ; or

(c) making recommendations upon any such subject and in particular, recommendations for the better co-ordination of policy and action with respect to that subject.

As this Article neither gives the Council power of adjudication nor does it preclude the jurisdiction of the Supreme Court with

regard to these matters, the ad hoc Council only have power of inquiry and recommendation. Some of the disputes may thus be nipped in the bud by timely investigation and consultation between the members of the Council and the interested parties. Other disputes may be referred to the Supreme Court. So the decision of this Council will work both as a preventive and as a curative measure to the disputes which have a chance to arise or may arise between the units of the Federation.

Another Article which refers to the relation between the different units of the Federation is Article 261. It lays down—

"(1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State." This Article provides against the chance of non-recognition of the public acts, records and judicial proceedigs of one State by another which might create confusion. If article 367 is read along with this Article, it becomes clear that the acts, records and judicial proceedings of one State in India cannot be considered as foreign in another State in as much as Article 367 (3) makes it clear that "for the purposes of this Constitution 'foreign State' means any State other than India :"

Article 301 provides for the freedom of inter-State as well as intra-State trade and commerce throughout the territory of India, but Article 302 gives Parliament the power to impose restrictions on the freedom of trade, commerce and intercourse if it is deemed necessary in the public interest to do so. One of the essential federal principles is that sectional interests should not prevail over national interests. This is why the freedom of movement of men (single citizenship) as well of goods (freedom of trade and intercourse) have been guaranteed by the Constitution. But if the Parliament thinks that public interest requires that some restriction should be placed upon this freedom, it is empowered to provide for such restrictions. Article 303 prohibits the Parliament as well as the Legislatures of a State to give or authorise giving preference to one State over another or making discrimination between one State and another by virtue of any entry relating to trade and commerce in the items of the Seventh Schedule. But in the next sub-clause, the Constitution authorises Parliament to make such discrimination to deal with the scarcity of goods. But this clause

empowers only the Parliament to mete out such preferential treatment. The State legislatures are to be bound by the provision of Article 303 (1) and cannot make discrimination between one State and another with regard to inter-State trade.

However Article 304 gives the State Legislatures power to impose tax (which will be non-discriminary in nature) on goods imported from other States but this tax should be similar to the tax imposed on goods manufactured or produced in that State and its purpose will be to prevent any discrimination between the two sets of goods (as produced or manufactured in the tax-imposing State and as imported from outside). But Article 304 (b) authorises the legislature of a State to impose reasonable restriction in the public interest with the previous sanction of the President. These provisions are similar to the doctrine of police power in the United States of America. But there the doctrine originated in Judicial decision while in India it has constitutional sanction behind it.

Article 307 lays down,

"Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of Articles 301, 303 and 304 and confer on the authority so appointed such powers and such duties as it thinks necessary."

In order to ensure the freedom of trade, commerce and intercourse, Article 286 provided that, "No law of a State shall impose or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State.

(b) in the course of the import of the goods into, or the export of the goods out of, the territory of India.....

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce...."

Due to certain complications which originated out of the wrong interpretation of this Article, this was amended in 1956 and Clause (2) of the Article now reads as follows :—

"(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in Clause (1)".

This is analogous to the Commerce Clause in the constitutions of the U. S. A. which says, "Congress shall have the power to regulate commerce with foreign nations, and among the several states and with the India tribes."

In the Indian Constitution also, Parliament has been made the sole authority determinig the condition of inter-state trade and foreign trade.

Thus we see that in matters of legislative and financial relations, there is dual authority. In the sphere of administrative relations the division of powers ordinarily follows the legislative division and in emergency times the whole Constitution becomes a unitary one. With that the administrative relations also become the relations of a unitary State. Referring to this, Shree Mangal Chandra Jain Kagzi has said, "In times of emergencies the sun of federalism is eclipsed. Eclipse may for a moment become complete but soon it begins to recede and the sun of federalism re-appears."[18]

But in normal times also the dual polity is sometimes obliterated. Whether the Centre gives directions to the states or delegates functions, whether it gives grants-in-aid or regulates commercial relations between the States, the States are turned into agents of the Centre. This is natural because in a federation there is a dual set of authority and division of powers. Each set of authority is generally speaking independent in the exercise of the powers which concern itself alone but each and all must be subject to certain rules and regulations in its dealings with the other authority. According to the Constitution, the executive power of each State should be so exercised as not to obstruct the working of the executive power of the Union. Here comes the question of the conflict of the general interest and the local interest. In fact strict division of powers is nowhere followed in practice. Even in the United States of America the dictates of the modern times have been responsible for the swing of the pendulum to the other side.

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18 Kagzi Mangal Chandra Jain : The Constitution of India, Published 1958, p. 28.

As a result of industrial, scientific and technological advancement, the artificial barrier between state and state is breaking down. The increased amount of governmental work and increased problems of society have also pointed towards this direction. These conditions in the United States of American have occurred as a result of slow evolution in the course of centuries. But they were present in India from the very beginning of her post-independence constitutional set up. After all what is needed in a State, whether it has a unitary or a federal system of government, is smooth working. In the United States of America laws of the general government are considered to be supreme law of the land. But as remarked by Hamilton in the Federalist :—

"But it will not follow from this doctrine that the acts of the larger society which are not pursuant to its constitutional powers but which are invasions of the residuary authorities of the smaller societies, will become the Supreme law of the land. These will be acts of usurpation and will deserve to be treated as such."[19]

If the Central Government in the exercise of its lawful power requires compliance from the state governments, that means the general interest requires the sympathy and co-operation of the special interests. But under the Indian Constitution if the Central Government crosses the limit of its legal powers, there is the Supreme Court to decide disputes between the Centre and the States for Article 131 lays down.

"Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other Court, have original jurisdiction in any dispute,

(a) between the Government of India and one or more States ; or (b) between the Government of India and any State or States on one side and one or more other States on the other."

The Supreme Court, though an organ of the Union, is an impartial body and as such in case of the Centre giving unlawful directions or crossing the limit of the power conferred upon it by the Constitution, the States can file a suit against it before the Supreme Court. Thus the autonomy of the States may be preserved inspite of the fact that at times they may have to turn into agents of the Central Government.

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[19] The Federalist, No. XXXIII.

CHAPTER XIII DIVISION OF POWERS—COMPARATIVE

There is charge against the Indian Constitution that too much power has been given under it to the Centre. As Shree K. Santhanam said in the Constituent Assembly, "I do not want that the Central Government should be made responsible for everything."[1]

K. C. Wheare says about the Indian Constitution, "……Just as in Canada the federal principle was modified by unitary elements in the form of control by the general government over the provincial governments, so also in the Indian Constitution but much more so the central government is given powers of intervention in the conduct of the affairs of the State governments which modifies the federal principle."[2]

In the footnote he wrote that he was thinking of Articles 249, 352-360 and 371 in the Indian Constitution.

Dr. D. N. Sen sarcastically remarks,

"Our State is not State ; our autonomy is not autonomy ; our State autonomy is not State autonomy. With these reservations our state autonomy is complete and perfect."[3]

But when we examine the working of these provisions in the Indian Constitutional government and launch into a comparision of the Indian Constitution with other federal constitutions in the world, which were framed before and after the Second World War, we cannot agree with the critics. Wheare specially mentions a few articles in the Constitution, which according to him are responsible for the charge of deviation from the federal principle. So let us examine them one by one.

Article 249 says, "Notwithstanding anything in the foregoing provisions of this chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any

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1 Constituent Assembly Debates, Vol. V. No. 3, p. 56.
2 Wheare, K. C.: Federal Government, p. 28.
3 Sen Dhirendranath : The Paradox of Freedom, p. 19.

matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force."

Now the main body of the Council of States consists of the members elected by the Legislative Assemblies of the States. So if the Parliament assumes power over the matters in the State List, it will do so with the consent of the representatives of the States. There will also be the restriction that such power must be one necessary in the national interest. Hence there will be no arbitrary use of the power.

Then we come to Articles 352—360, that is, the emergency powers given to the Centre under the Indian Constitution. Under Article 352, the President is empowered to declare emergency. Under Article 353, the Union executive may give direction to the State as to the manner in which its executive power is to be exercised. Article 354 empowers the President, while a Proclamation of Emergency is in operation, to suspend by order the allocation of financial powers between the Union and the States.

Article 355 says that, "It shall be the duty of the Union to protect every State against external aggression, and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution."

Article 356 empowers the President to confer all powers of the State Legislature upon the Parliament in case of the failure of the Constitutional machinery.

Article 357 makes the Parliament competent to confer on the President the power of the Legislature of the State in case of the failure of the constitutional machinary. Article 358 and 359 speak about the suspension of the enjoyment of fundamental rights by the citizens in case of the declaration of emergency.

Article 360 makes provision for financial emergencies. It says that when the President is satisfied that the financial stability or credit of India or any part of India is threatened, by a Proclamation he may make the declaration that the executive authority of the Union shall extend to the giving of directions

to any state to observe such canons of financial propriety as may be specified in the directions.

Thus three types of emergency are mentioned in the Indian Constitution viz. (a) When there is an external agression or internal rebellion or such other disturbances ; (b) When there is a failure of the constitutional machinary in a State and (c) When there is a danger to the financial, stability of the Union or any part of it.

In the U.S.A. we find that the War powers of the Congress are mentioned in Article 1. Sec. 8, items 11, 12, 13, 14, 15 and 16. These are the powers to declare war, raise and support armies, to provide and maintain a navy, control and regulate the land and naval forces, provide for the calling forth of the militia, to execute the laws of the Union and the power to provide for organising, arming and disciplining the militia. Now all these items may be termed as "War Powers" which may be defined as the power to take each and every measures to wage war successfully unless and until such measures are forbidden by the Constitution. As Corwin says, the War Power may be said to be unaffected by the principle of federalism, because there are no States' Rights against it.[4]

Item 16 leaves to the States the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress. The militia was long regarded as a purely State affair but in the National Defence Act of June 3, 1916, "The militia of the United States" is defined as consisting "of all able-bodied male citizens of the United States." The Act rests on the principle that the right of the States to maintain a militia is always subordinate to the power of the Congress to raise and support armies. Together with this item we have to read Article I Section X item 3, which says that, "No State shall without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power or engage in war, unless actually invaded or in such imminent danger as will not admit of delay."

Thus the action of the States under this item is limited by the provision for the consent of the Congress. There is no doubt

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[4] Corwin Edward S : Constitution : What it means today, p. 57.

that the War Power of the Federal Government in the U.S.A. is a means of increasing its power. It is, of course, impossible to conceive that the Federal Government will remain indifferent when a foreign power invades the country but by virtue of the power granted to the federation by the Second part of Article IV, Section 4, that is, the power to protect the States against domestic violence, the federal authorities have sometimes used this power even when the State governments did not ask for it or definitely refused it. Harold Zink mentions two interesting examples of such unwelcome assistance or federal intervention in State power. In one instance President Cleveland sent troops to Illinois to protect the mails inspite of the protest of the Governor of Illinois. Another instance is that of Presiden Roosevelt who in 1941 sent troops to bring order in the California plant of the North America Aviation Company. "Thus it would seem that federal assistance is available not only in those rare instances when a State desires it but when it does not ask for and even opposes such intervention. The local police may resent the presence of the federal agents—as has been the case at times ; yet there is very little that they can do about it beyond refusing to co-operate."[5]

Thus we see that the right of the general government in the U.S.A. in respect of intervention into State powers in order to protect them against external aggression or internal disturbance, is complete. With regard to suspension of fundamental rights in times of war, we find in the U.S.A. also there are instances. As Corwin says, ".....What total war can do to personal rights despite the 'due process' Clause and despite its chosen instrument judicial review, is shown by the measures which the National government adopted early in the present war (he means the second world war) respecting Japaneese residents on the West Coast. What in brief, these measures accomplished was the removal of 112,000 Japanese, two-thirds of them citizens of the United States by birth, from their homes and properties."[6]

The increase in control by the general government is also indicated by the financial aspect. Throughout the nineteenth century, the Congress made grants to the States to furnish arms

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[5] Zink Harold : Federal Government and Politics in the United States, p. 58.

[6] Corwin Edward S. : *Op. cit.* p. 58.

and equipments to the State militia. But little attempt was made to control this expenditure. Since 1913 Congress has imposed a more detailed control over the way in which the money is spent.

"The Supreme Court in 1936, speaking by Justice Sutherland, adopted the view, first advanced in 1792, that the National Government does not get its powers in these fields from the Constitution, but possesses them as an inherent attribute of national sovereignty. The War power is unaffected by the principle of Dual Federalism."[7]

With regard to Canada and Australia, a relevant remark may be quoted from Sir Ivor Jennings.

"During the war of 1914-18, the High Court, like the Privy Council in respect of Canada largely extended Commonwealth powers. This was done particularly in view of the wide defence power given by S. 51 (vi) 'naval and military defence of the Commonwealth and the several States' which was so simply and largely conferred that in time of war the Parliament could itself make any laws whatever or authorise the executive to make any regulations whatever, unless they could be plainly shown to have no possible bearing on the military preparedness of the nation."[8]

If this can happen in the other Federations, no one ought to take any objection against the emergency provisions of the Indian Constitution. The difficulty of the latter, for which it has been subject to attack by the critics, is that it has tried to put in black and white all the customs and conventions which have developed around the other Constitutions and people who have paid too much attention to the constitutional provisions alone have tried to prove that other countries have got ideal federations while in India there are so many deviations.

Wheare's last charge was about Article 371. As it related to Part B States, it is now obsolete after the re-organisation of States in 1956. In previous chapters we have discussed itemwise the powers which have been given to the Centre by the Indian Constitution and have shown their necessity in the modern constitutional set-up. It now remains to compare the broad features of the division of powers in the Indian Constitution with

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[7] *Ibid.*, pp. 56-57.
[8] Jennings Ivor : Constitutional Laws of the Commonwealth, p. 274.

those of the other Constitutions. In doing so, we have to remember one thing. A long time has elapsed since the older federations began their experiments with this type of Constitution. Their constitutions can be called mere framework over which the bricks and cements of conventions had to be set in order to complete the federal building. So we have to consider not only the constitutional provisions but have also to consider the developments around the constitutions. The critics of the Indian federation often forget that India has profited by the trials and errors of older federations formed in the pre-war days and has included in her Constitution some of the practices of other federations which are unchartered but are the flesh and blood over the skeleton of the older federations.

On 20th August 1947 Shree Gopalaswami Ayyangar said in the Debates of the Constituent Assembly, "The Committee (meaning the Union Powers Committee) came to the conclusion that we should make the Centre in this country as strong as possible consistent with leaving a fairly wide range of subject to the Provinces in which they would have the utmost freedom to order things as they liked."*

The words 'as strong as possible' means as strong as possible without destroying the federal structure. Now the very first thing which we notice about the Constitution is that the residuary powers in it are given to the Centre and this naturally gives the Centre power over a vast number of unlisted subjects. Then again there are three lists of legislative powers, one for the Centre, one for the units, and one concurrent. The list of concurrent powers with the provision that in case of repugnancy the laws made by the Parliament will prevail over the laws made by the units, naturally makes the Centre more powerful than the units.

Turning to other federations, we find that in the U.S.A. there is no enumeration of the powers of the States. Only the powers of the Union are enumerated and certain things are prohibited to the States. With these exceptions the States are authorised to legislate on all subjects. The tenth Amendment clearly lays down,

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

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* Constituent Assembly Debates, Vol. V, No. 3, p. 39.

Now what are the subjects over which the State Legislatures cannot legislate ? Article I section 10 mentions a number of such items viz.

Article 1 Section 10 Clause "(1) No state shall enter into any treaty, alliance or confederation, coin money, emit bills of credit ; make anything but gold and silver coin a legal tender in payment of debts ; pass any bill of attainder, expost facto law or law impairing the obligation of contracts or grant any title of nobility."

Clause (2) "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspectional laws ; and the net produce of all duties and imposts, laid by any State on imports and exports, shall be for the use of the Treasury of the United States ; and all such laws shall be subject to the revision and control of the Congress."

Clause (3) "No State shall, without the consent of the Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay."

In Clauses (2) and (3), we find not only Prohibition for the States but a Constitutional provision that Congress should have the power of normative regulation in so far as consent of the Congress would be necessary for the States in order to legislate on these subjects. Not only this. If the States, with the consent of the Congress lay any imposts or duties on the export or import, the States will not be benifitted by such imposition. The money raised would go to the Treasury of the United States.

The reserved rights of the States also have been subject to conflicting and diverse type of interpretation by the Supreme Court in different periods of history. As Corwin says, "The earliest official interpreters of the Constitution regarded this amendment (he means the tenth amendment) as merely stating the truism that not all powers are delegated to the National Government. Recent cases, however, make it clear that it is the doctrine of the Court to day, that when an exercise of national power is otherwise constitutional, there is no reserved State power to nullify it."[9]

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[9] Cornwin Edwards : *Op. cit.* pp. 179-180.

In fact the need of social control is a potent instrument in the hands of the Congress which practically extends its constitutional jurisdiction over the powers of declaring war, raising armies, coining money and regulating foreign commerce.

The control of social welfare by federal legislation is a feature which is common among all the older federations, specially in the period following the Second World War. In Australia the Commonwealth Parliament has enumerated and therefore limited powers. The units have residual powers. This is provided by section 107 of the Constitution of the Commonwealth of Australia which says, "Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth or as at the admission or establishment of the State, as the case may be."

In this respect the Constitution of Australia shows similarity with the Constitution of the U.S.A. and not with that of Canada. The enumerated powers of the Australian Parliament may again be divided into the exclusive and concurrent powers. The former refers to the seat of Government, of the Commonwealth, Departments of public service, customs, excise and bounties on the production or export of goods, jurisdiction over any part of the State ceded by the latter to the control of the Commonwealth. Other powers of legislation which are enumerated in section 51 of the Constitution are all concurrent powers, that is to say, they may be exercised by the State legislatures so long as the Commonwealth Parliament does not pass any law on them. This is provided by Section 109 which says "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of inconsistency, be invalid."

The Australian Constitution practically shows no similarity with the general scheme of division of powers followed in the Indian Constitution, in so far as the latter includes three separate lists of subjects for legislation. But though not explicitly enumerated, the Australian Constitution provides for concurrent powers and the provision about them is akin to that in the Indian

Constitution, in so far as in case of repugnancy, the law passed by the federal legislature will prevail over the law passed by the State Legislature. The provision about the residuary powers is different in as much as the residuary powers in the Indian Constitution is left with the Centre whereas in Australia it is left with the units.

In this respect the Canadian Constitution shows similarity with the Indian Constitution. Section 91 of the British North America Act of 1867 declares, "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Province."

In the Indian Constitution also we have the following provision, "Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List."[10]

Among older federations, that is, federations framed before the war, we find that in the Constitution of Switzerland framed in 1874, the powers of the Confederal Government are enumerated but that does not limit its powers in so far as the Federal Tribunal is not given the power to declare federal laws invalid.

In the 1936 Constitution of Soviet Russia, the powers of the Union Government are enumerated and the residuary powers are left with the constituent units.

Among the comparatively new federations, that is, the federations which were formed after the Second World War, we find certain features which are comparable to those of India. In Nigeria as in India, we find a list of concurrent powers including important subjects like industrial development, gas, electricity and water power, industrial relation and labour condition. Planning and regulation of industrial development are intended to be matters of joint discussion and co-operation between the Central and State Governments both in India and in Nigera. In the federal constitution of Central Africa also there is a list of concurrent powers which include industrial development, electricity,

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[10] The Constitution of India, Article 248.

land banks, agricultural co-operatives and roads and road transport. Then again both in Nigeria and Central Africa, there are provisions that the federal legislatures and federal executive may delegate their functions to the territorial executives and vice versa.

Now a cursory glance at the federations formed after the War reveals certain peculiarities which are common among them and are in glaring contrast with the provisions in the federations formed before the war. These are the concurrent lists and the constitutional provision for Centre-State co-operation. In none of the federations formed before the Second World War, we find any concurrent list although in the Australian Constitution there is an indirect reference to some concurrent powers (by mentioning some of the subjects to be exclusively federal, it makes others concurrent).

The reason for this new development in the federations providing for centre-state co-operation is that they have learnt by the example of the older federations. The increasing powers assumed by modern governments (whether they are federal or unitary) have extended the sphere of their influence. This has led in all federations to the exercise of such powers by the federal governments which were undreamt of when the federations were formed. It has become so as a result of modern technological advances, which have reduced the distance between different localities and different States and have turned the whole country into what Graham Wallas calls, "A Great society". The introduction of automobile has made the maintenance of highway a national concern, specially because the highway is an important link between the market and the sources of supply. Due to improved transport system, supplies and technical services both are obtained from a distance and have become a concern of the nation. The increasing mobility of population due to quick transport has increased the chance of spreading infectious diseases. Social security, relief of poverty, and social insurance—these are all now matters of national concern. At least the federal government in all the federations is interested in maintaing a minimum standard in respect of these services as quick and cheap means of transport has made social unrest also transportable.

Then again the national government has also become more and more interested in education as low standard of education in one

State may have an injurious effect on another State. If the poorly educated citizens move from the State of their origin to a State with higher standards that will be a loss to the latter. Unemployment resulting from economic depression and such other nationwide reason has also become a subject of national policy. The same is the case of the level of production and economic activity. So we see that many of the government services which are constitutionally left to the States have assumed national importance, and the federal government cannot keep itself confined to an ivory tower of indifference with regard to them. This was the general condition in federations when the war broke out. War gave an added impetus to a change in the Contre-State relation. As Birch says,

"The post-war period has seen important developments in federal-state relations in all three federations (he means the U. S. A., Canada and Australia)....They have come about partly as a result of the war itself, partly because the high costs of defence in a period of continued international tension have put a heavy financial burden on the national governments and partly because of the icreased demand for social and economic security. Put together they mean that federalism in these countries has entered a new phase."[11]

Birch mentions four marked developments in these three federations which have almost reduced to nullity the conventional idea about the complete independence of the Centre and the units in a federation. The first of these is that income tax has now become a monopoly of the federal government in almost all the federations. Then again the State Governments are depending more and more on federal payments. Birch gives statistical data about the amount of money which the units in each federation receive from the federal government. In Australia 60 per cent of the general revenue of the States is derived from federal sources. In Canada apart from Quebce, it is about 30 per cent. In the U.S.A. it has increased from 12 per cent (in the pre war days) to 20 per cent. Thirdly, the poorer States in all the federations are receiving more benefits from the Centre than they did before. Fourthly, social welfare which is constitutionally left to the States, is being increasingly controlled by federal legislation, and is being

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[11] Birch, A. H. : Federalism, Finance and Social Legislation, p. 288.

financed from federal resources. Birch gives certain concrete examples of this. "Some services," he says, "like old age pensions in all three countries and unemployment benefits in Canada and Australia are provided etirely by the federal authorities. Others including the majority of the American and Canadian social services, are administered by the state governments within the frame work of national program enacted by the federal legislature and with the help of federal grants....Generally speaking it is the federal government in each country which has promoted the social welfare developments of the past two decades and which is likely to take the initiative in the future."[12]

In fact the federal principle which enjoins upon the framers of the Constitution to give considerable loeway to the States to frame their own policy, does not preclude a little bit of standardisation from above which may be necessary for maintaining the central organs and "also to protect certain minimal institutional forms, rights and decencies that are deemed more important than autonomy and variation among the constituent governments."[13]

On a close study of the costitutional growth in the federations, we find grants-in-aid, use of state officials as agents of the central government, federal collaboration sought by states, the power of the federal government to tax, and the related power to spend for general welfare and the war power of the general governments as the avenues through which the federal power has increased. In the U. S. A. the main instrument for spreading this power has been the Supreme Court with its liberal interpretation of the powers given to the federation specially its Commerce power. Article 1Sec.8 Clause (3) confers on the Congress the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes."

The regulations of inter-state commerce is a power which is to be exercised by the federal government exclusively and the states have no legislative power in this matter.

The Commerce Clause was first interpreted by the Supreme Court in 1824 in Gibbons vs. Ogden.[14] The division of powers

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[12] Birch, A. H.: *Op. cit.* pp. 289-290.
[13] Machahon Arthur W : Federalism, Mature and Emergent, p. 5.
[14] Post Gordon, De Lancy Frances, Darby Fredryc : Constitutional Cases, p. 181.

between the Congress and the State legislatures with regard to the Commerce Clause is best explained in the words of Chief Justice Marshall in this case.

"The enumeration", he said, "presupposes something not enumerated ; and that something, if we regard the language or the subject of the sentence, most be exclusively internal Commerce of a state. The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally ; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the Government."[15]

"This power," he says later, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."[16]

The states in the U.S.A. possess police power which is the power to promote public health and safety, the morals, the convenience and the general welfare of the people.

But the Supreme Court maintained that despite the absence of controlling federal law, the States may not regulate inter-state commerce so as to restrict materially its flow or to deprive it of necessary regulatory uniformity by "simply invoking the convenient apologetics of the police power."[17]

It was later decided in a case that state legislation would be invalid if it unduly burdened that commerce where uniformity was necessary.[18]

Thus the freedom of inter-state trade in the U.S.A. means freedom from interference by the States. It gives plenary power to the Federation to interfere in the exercise of the state power in this respect.

In Australia due to the wide area covered by each unit, intra-state commerce is more important than inter-state commerce.

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15 Gibbons *vs. Ogden* : 1824.
16 *Ibid.*
17 Mr. Justice Holmes in Kansas City Southern R. Co. *vs.* Kaw Valley District 1914.
18 Morgan *vs.* Commonwealth of Virginia, 1945.

"Therefore, even though there has been no difference in interpretation of the powers between the U.S.A. and Australian Courts, the Commonwealth Government has not found it possible to legislate uniformly on commercial matters except such as are specially included among Commonwealth powers."[19]

Instead of inter-state commerce, it is industrial dispute which spreads in Australia beyond the territory of each federal unit and the federal authority regulates many economic matters through its power over industrial matters. Another factor which has increased the power of the federal Government in Australia is its unfettered power to tax.

"Indeed it has been claimed that the recent decision of the High Court declaring that the Commonwealth Parliament had the right to make tax laws and to levy uniform taxes for the whole nation marked the end of the Federal Era in the constitutional relations of the Commonwealth and the States."[20]

Paradoxically enough in Canada though the Constitution seems to favour the extension of the Federal power (by leaving the residuary powers to the Centre and giving it the power to disallow provincial legislation), the rulings of the Privy Council emphasised the Federal character and refused to treat Provincial Governments as mere local government authorities.

The original distribution of powers was made on the assumption that matters of general interest must be given to the Dominion while matters of local interest should be given to the Provinces.

Then by the beginning of the century the idea developed that the promotion of economic and social welfare is a responsibility of the government. The provincial governments found it very difficult to carry on the financial burden of it.

For over twenty years from the beginning of the Confederation the power given to the Dominion by the opening Clause of section 91 viz. "Law for the peace, order and good government of Canada" was interpreted in accordance with the original interpretation. The most important case with regard to it was Russel vs. the Queen (1882) in which a Dominion law was upheld on the

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[19] Gadgil, D. R. : The Federal Problem in India, p. 33.
[20] *Ibid.*, p. 33.

ground that it was of general or national importance relating to public order and safety. But later on the Courts moved away from this position, that is, they were for giving more powers to the province.

"The Judicial Committee held that while the legislative powers of the Dominion under the enumerated heads of Sec. 91 would over-ride the provincial powers as enumerated in Section 92, the enumerated powers of Section 92 would normally override the general power of the Dominion to legislate for the peace, order and good government of Canada."[21]

When the overriding power of the latter general clause vanished, the comparative importance of Dominion and Provincial legislative power was confined to a competition between the enumerated heads of Sections 91 and 92. But the Provinces had an advantage over the Dominion because Section 92 contained two items of general significance. They were "property and civil rights in the province," and "generally all matters of merely local or private nature in the province," while section 91 has only one such item "The regulation of trade and commerce" and it began to receive a restricted interpretation."[22]

The residual powers which originally belonged to the Dominion is now a latent power exercised only in times of emergency. In normal times there is hardly any legislation of general implication which does not affect the property and civil rights and the latter is a comprehensive power in the hands of the provinces.

Generally speaking, if we survey the older and mature federations, that is, the federations which were formed before the second World War, we find that they have developed various extra-constitutional devices like liberal interpretation of the federal power by the Supreme Court, co-ordination of the federal and State policy by conditional grants from the federal government to the states, the federal government monopolising the taxation of income by provisional arrangement for temporary payments to the State governments. Thus Constitutional provisions have been supplemented by federal practices which have brought the theoretical provisions in touch with the practical needs of the work-a-day

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21 Dawson Robert Mac Gregory : The Government of Canada, p. 110.
22 Rowell-Sirois Report Book, p. 58.

world. The new Constitutions, that is, those of Nigeria and Central Africa, include provisions for these features which have become constitutional practices in the older federations. They all ensure flexibility by including in the Constitution a concurrent list of legislative powers.

"If the new developments in the older federations are considered together with the new characteristics of the post war federations, it seems clear that federalism has entered a new phase. Perhaps this may conveniently be called the phase of co-operative federalism. For whereas the guiding principle of the eighteenth and nineteenth century federalism was the independence of state and federal authorities, the guiding principle of mid-twentieth century federalism is the need for co-operation between them."[23]

The framers of the Indian Constitution profited by the example of the older federations (the federations of Nigeria and Central Africa were formed later) and understood that even in a federation, it is not possible for the general and the regional governments to keep themselves confined within the limits set by the Constitution and be completely independent in the exercise of the powers granted to them by the Constitution. This is why inter-governmental co-operation has been guaranted by the provision for the concurrent powers and chances of norm-creating and policy-guiding by the Central government has been provided by giving it power to legislate with regard to residuary subjects, if any such ever crop up in the future.

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[23] Birch, A. H.: *Op. cit.*, p. 305

CHAPTER XIV | DIVISION OF FINANCIAL POWERS—COMPARATIVE

"The stubborn fact", says Mr. Roy Blough in Studies in Federalism, "that the government and the services of government are possible only if they can be paid for, makes finance one of the central factors determining the success or failure of a federal system of government as well as any other governmental system."[1]

The Federalist also mentioned that, "It is therefore as necessary that the State governments should be able to command the means of supplying their wants, as that the national government should possess the like faculty in respect of the wants of the Union."[2]

Thus it can be said that in actual practice, financial autonomy is the backbone of state autonomy in all federations. But the general government has in all federations exclusive control over currency and coinage. That is to say, it has the sole power to issue metallic as well as paper currency. In Switzerland by Articles 38-39 and in Canada by Section 91 (14), (15), (16) and (20), the federal government is given this power. In the U.S.A. Article I (VIII) and (X) give this power to the general government in the following words, "Article I (viii) The Congress shall have power.....(5) To coin money, regulate the value thereof and of foreign coin....." and (x) (1) no state shall coin money." This power was extended by judicial interpretation in the Gold Clause cases of 1935 in which the majority opinion of the Courts described it as a "broad and comprehensive national authority over the subjects of revenue, finance and currency." Entry 36 of List 1 of the Indian Constitution gives the Centre power over currency, coinage and legal tender.

"It is clear, therefore, that the financial autonomy of the regional governments is always conditional upon their working within the framework of currency and credit determined in the last resort by the general government."[3]

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1 An essay in Studies in Federalism edited by Friedrich and Baer, p. 385.
2 The Federalist No. XXXI, p. 149.
3 Wheare K. C. : The Federal Government, p. 99.

So while discussing the financial resources in a State within a federation, we have to remember that their financial autonomy is limited by this exclusive power of the federal government over currency and coinage.

Now with regard to the allocation of resources, the most important problems are the sources of revenue given by the Constitution to the Centre and the States respectively and the provision for the transfer of funds from the federation to the States and vice versa. The second problem may take any one of the following forms :

(a) It may be tied to some specific forms of revenue, that is to say, it may be a shared tax.

(b) It may be tied to some specific objects of expenditure, that is to say, it may be grants-in-aid. or

(c) It may be a block grant from the Centre to the States without attachment to any form of revenue or reference to any particular mode of expenditure. In other words it may be a general grant.

Now let us discuss the financial division of powers in India with reference to the main sources of revenue given to the Centre, the system of shared taxes, the provision for grants-in-aid and compare them with the provisions in other federal Constitutions. The major sources of taxation in India, are taxes on income other than agricultural income, excise duty, corporation tax and estate duty and customs.

Entry 82 of List I of the Indian Constitution mentions, "Taxes on income other than agricultural income." Analogous provision is found in the Constitution of the U.S.A. The 16th Amendment confers on the Congress the power "to lay and collect taxes on incomes, from whatever source derived....." and it forms now one of the major sources of revenue there.

In Australia, entry 51 (ii) of the Constitution gives the Parliament the general power of taxation. "There being no limits on the objects of the Commonwealth taxing power..... the Commonwealth has imposed income tax (Income Tax Act 1915) on all taxable income from property or personal exertion,

save those incomes which are exempted by the Act. The States having concurrent power of taxation may tax pensions paid by the Commonwealth or wages fixed by an Arbitration Award. But neither the Commonwealth nor a State can tax property belonging to each other."[4]

In 1942 money was needed by the Commonwealth of Australia to pay for war expenditure. An income tax was imposed by the Commonwealth Government and the States were requested to vacate the field. The States disagreed. Then by passing a series of four Acts the Commonwealth Government practically drove away the State Governments from the field. This may raise objection as destroying the division of powers provided by the Constitution. But Section 109 of the Constitution says, "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of inconsistency, be invalid." Both the Commonwealth and the States were making law here in respect of income tax and as there was a conflict between the two, the law of the general government was allowed to prevail. In a case viz. In re Silver Bros (1932) A.C. in Canada, the judicial committee of the Privy Council delivered the same type of judgement where a conflict of debts of the general government and the regional Government due to income tax had arisen. After quoting these two instances Wheare says, "It is necessary to distinguish the taxing power from other legislative powers. Its nature is different. It is a power to raise means, it is not a power to regulate specific fields."[5]

Now, one thing is certain. If finance means the life blood of the system of government, to keep one of the most important sources of finance viz. taxation, in a separate group and say that, "it is not a power to regulate specific fields" is unjust. Power over finance naturally gives power over specific fields. To give legislative powers without the financial power to carry them out in practice, means mere theoretical power. The fact is that such exclusion of State governments from the field of taxation is surely a deviation from the traditional theory of federation about the independence of the two authorities but it is a compromise with

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[4]Basu D. D.: A Commentary on the Indian Constitution, pp. 954-955.
[5] Wheare K. C.: *Op. cit.* p. 113.

the needs of practical life to which every theory of perfection must adjust itself.

The next major source of taxation in the Indian Constitution is duties of excise. Entry 84 of List I gives to the Union the proceeds from the following sources :

"Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption.

(b) Opium, Indian hemp and other narcotic drugs and narcotics but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

In the U.S.A. Article 1 (8) of the Constitution gives the Congress the power to lay and collect excise. In Australia Section 90 of the Constitution gives the Parliament exclusive power over "duties of excise."

In almost all federations control over customs also is given to the Centre. In the Constitution of the U.S.A. Article 1 (8), in the British North America Act Section 122, in Australia Section 90 give the Centre this power. In India Entry 83 of List I gives the Centre power over customs.

Entry 85 of List I of the Indian Constitution mentions Corporation Tax. In Canada also Corporation Tax is a federal tax. Then comes estate duty which is given by Entry 87 of List I (of the Indian Constitution) to the Centre. In the U.S.A. "the federal 'death tax' first imposed in 1916, includes both estate and succession duties."[6]

The reasons for which these sources of taxation are given to the Centre in so many federations is not far to seek. As we have already mentioned income tax has become a monopoly of the federal Government in most of the federations. With easier and cheaper means of transport than before, the sources of tax revenue have become comparatively complicated. Now a tax-payer may reside in one state, have his business or profession in another state and spend money in a third state. In such a case more

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[6] Basu D. D.: A Commentary on the Constitution of India, p. 958.

than one unit may have vaild jurisdiction over the tax-payer. Then comes Corporation tax. Here again the Corporation may be incorporated in one state and carry on its business in a number of states. It may buy its raw materials in one state, have its factories in another and sell its products in a third one. In such a case many states will have jurisdiction over the Corporation.

Then again with regard to estate duty, a man may have lived in one State, earned money by doing business in another state, may have deposited his money in the Bank of another state and may have died in still another. Thus a number of States will have valid claims to impose estate duty on his property.

Now if all the States really impose tax, it will unnecessarily complicate the taxation system and it will be a sort of confiscation of the property of the citizens. This is one of the reasons why these sources of revenue have been given to the Centre.

Coming to excise, we find that the States often find it difficult to administer effectively some kinds of taxes. Among them come excise taxes on liquor and tobacco. The federal governments have found that the only way these taxes can be imposed is on the manufacture. Otherwise it is very difficult to check illict sale and purchase. Then again if these taxes were left to the States, only a few states would be able to impose them, as the production of distilled spirit or tobacco is concentrated in a few states only....So it is desirable to make it a central source of revenue, though in India excise duty on some selected articles is given to the States.

It is not only the proceeds of the excise duty which are shared between the two authorities but income tax and stamp duties are also shared taxes in India. There are three types of shared taxes in India. Article 268 provides for some duties which will be levied by the Union but will be collected and appropriated by the States. Article 269 provides for a second category of taxes which will be levied and collected by the Union but will be assigned to the States. The comes Article 270 which provides for a third category of taxation which will be levied and collected by the Union but its proceeds will be distributed between the Centre and the States.

It may be argued that there is a great difference between giving a particular source of taxation to the States exclusively and giving it to the Centre with the provision that a particular share of it has to be given to the States because in the latter case, the Centre will have full control over the units. It is true but at the same time it is also true that shared taxes is a feature which is common with many modern federations viz. Switzerland, Canada and Australia. The Constitution of the U.S.A., of course, mentions no such shared tax. But in the Constitution of Switzerland there is a provision for the whole of the customs revenue to flow into the federal treasury and for the four Alpine Cantons to receive a particular sum of money for supporting the international Alpine road. Then again half the yield of Cantonal Service exemption taxes go to the federal treasury since 1874. Article 32-bis which was first incorporated in 1885 and amended in 1930 provides that half the yield from taxes on liquor should be distributed among the cantons according to population. Then again, one fifth of the yield from stamp taxes which are being levied from 1917, is to be paid to the Cantons. In Canada 80 per cent of Dominion transfer to the Provinces "are payments in lieu of provincial tax revenues in the income and inheritance fields. This ....item is not precisely a shared tax in the technical sense, but it may be fairly regarded as a Canadian substitute for tax sharing in a field where the Dominion's powers to force the Provinces into tax sharing is doubtful."[7]

In Australia one section of the Constitution requires that at least three fourth of the Commonwealth revenue from customs and excise must be paid to the State for at least ten years. So the system of shared taxes is not an unique system in India. Coming to grants-in-aid, we find that they may be either permissive or obligatory. In the following Articles we find permissive grants. Article 275 (1) of the Indian Constitution says. "Such sums as Parliament may by law provide shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of such states as Parliament may determine to be in need of assistance, and different sums may be fixed for different States."

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[7] An essay written by Carl J. Friedrich and Theodore S. Baer in Studies in Federalism edited by R. Bowie and Carl J. Friedrich, p. 372.

The same Article goes on to say that States may receive grants-in-aid in order to meet the cost of development schemes undertaken by them with the approval of the Central Government or for the welfare of the Scheduled Tribes.

The first Finance Commission which was constituted in 1951 made some recommendations about the principles that should govern the grants-in-aid. First of all, there was provision for unconditional grants to meet the general deficiency in the State finance. Secondly, conditional grants might be made either to help the States in developing welfare services or to solve the problem of unemployment and provide for social security.

Then the Commission divided the States according to their need and Punjab and Assam came in the group of poorer States and the grant given to Punjab was Rs. 1.25 crores and Assam was given Rs. 1 crore. Special grants-in-aid were also given to certain States with a view to help them in expanding their primary education. These were Bihar, Madhaya Pradesh, Hyderabad, Rajasthan, Punjab, Madhaya Bharat and PEPSU.

As we have already said, the Constitution of the U.S.A. is silent about grants-in-aid but this is the legal position. In reality the federal government gives grants to the States in aid of agriculture, vocational education, highway construction, unemployment relief, child and maternity welfare and old age assistance.

"These grants are made subject to conditions and is followed by regulatory authority of the federal government. By these grants, the Federal Government has come to exercise a substantial control over the State Governments in recent years. It is a useful means of securing uniformity of action on the part of the States where that is necessary in the national interest, even though the subject matter be legally within the State jurisdiction. By this means the nation seeks to remove the inequality of financial resources as between the States and the inability of weaker States to maintain the indispensable standards of national efficiency in matters of health, education and the like. The Federal Government may require minimum standards and may insist on supervision of State plans. The devices by which the Federal Government controls the expenditure of the grants are (1) Advance approval of State plans and budgets ; (2) Federal inspection of the work

done ; (3) audits by Federal officers (4) the requirement of records and reports (5) the requirement that the employees in the State administrative agency be chosen under the system (6) Withdrawal of federal funds.....Federal aid has thus been a great centralising power."[8]

Coming to obligatory grants we find that Article 273 of the Indian Constitution says,"(1) There shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of the States of Assam, Bihar, Orissa and West Bengal, in lieu of assigment of any share of the net proceeds in each year of export duty on jute and jute products to those States, such sums as may be prescribed.

"(2) The sums so prescribed shall continue to be charged on the Consolidated Fund of India so long as any export duty on jute or jute products continues to be levied by the Government of India or until the expiration of ten years from the commencement of this Constitution whichever is earlier."

In Switzerland there were provisions in the Constitution of 1848 that the Cantons should receive compensation for the surrender of their power to levy customs duty. In 1874 these payments were abolished. But other provisions were added later on. Thus when in 1915, a war tax on profits was added, it was provided that 10 per cent of the profit should go to the Cantons. In 1919 a second war tax was imposed, and the Constitution provided that 20 p.c. of the proceeds should go to the Cantons. When in 1917 a stamp tax on securities, bills of exchange and the like was imposed, it was provided that the Cantons should receive 20 p.c. of the net proceeds.

Section 118 of the British North America Act 1867, that is, the original Constitution for the Dominion of Canada provided for annual subsidies to the four Provinces of New Brunswick, Nova Scotia, Ontario and Quebec, of sums ranging from 50,000 dollars to 80,000 dollars with a per capita subvention of 80 cents per head. This Section was amended by the British North American Act of 1907 and subsidy changed to sliding grant, that is, a grant varying from Province to Province from 100,000 dollars to 240,000 dollars

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[8] Basu, D. D.: *Op. cit.*, p. 690.

depending upon the population of the Province with a further per capita grant of 80 cents up to a population of 15,00,000 and 60 cents per head above that figure. These subsidy provisions are the minimum below which the Dominion Parliament cannot reduce its grants. But in actual practice, the subsidy has exceeded the Constitutional minimum. Special lump sum grant is also made to the poorer provinces.

In the Australian Constitution, Section 96 says, "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

In Australia this Section furnished the sole constitutional basis for grants-in-aid and partly the basis of the uniform tax program of 1942-1943.

"In effect these grants are either legislative gifits, grounded on a permissive and in no sense obligatory constitutional provision, or they are an Australian version of tax sharing which was forced through in the face of State resistance and which has completely excluded the States from the tax field affected."[9]

The grants-in-aid which are either provided in the Constitution or though not provided, are followed in actual practice in almost all federations, may evoke criticisms as encouraging extravagant expenditure and encorachment by the federal government upon the jurisdiction reserved for the States by the Constitution. The fact is that most of the grants are conditional grants e.g. in India the Constitution enjoins upon the Federal Government to give grants-in-aid for development projects or helping specially backward States in raising their standard of education. If the States had ample means to finance the program which was necessary in their own interest, federal intervention would have been confined to the financing of those activities which are of national interest. But the States are not always able to support their own projects.

"It is necessary," says K.C. Wheare, "to emphasise at the outset the nature of the functions originally allocated to the regional

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[9] An essay written by Carl J. Friedrich and Theodore Bear in Studies in Federalism, p. 372.

governments. They included almost all of what it is now usual to call the social services—education, police, public health, old age and disability pensions, poor relief, unemployment assistance, social insurance, the care of the blind, maternity and child welfare. From the point of view of public finance, these services have one important characteristic—they are expensive. And they are expensive not only in themselves....but also because few people who need them can afford to pay for them in full....Governments charged with the provision of these services have therefore an expensive task to perform. And if this is true in normal times, it is intensified and multiplied in times of economic depression.... Some of the regions at any rate have not been able to afford to provide the services which were demanded of them....Such regions are compelled to ask for assistance from the general government or to allow their standard of services to decline or stangnate."[10]

Sometimes inspite of the good intention of the States, the scope and quality of their activities have been limited and if federal governments do not intervene, their interest is likely to be diversely affected. In such case there remains no alternative for the federal government but to intervene. The federal government has to intervene also in order to preseve the national character of the economy of the country. With this idea the commerce power was given to the national government in the older federations and the Indian Constitution, being inspired by their example, has also done the same. Article 1 section 8 (3) of the Constitution of the U.S.A. gives power to the Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

Section 92 of the Constitution of the Commonwealth of Australia gives the general government the power over commerce, in the following words. "On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

Section 121 of the British North America Act says, "All articles of the growth, produce or manufacture of any one of the Province shall, from and after the Union, be admitted free into each of the other Provinces."

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[10] Wheare K. C.: *Op. cit.*, p. 117

Article 301 of the Indian Constitution provides, "Subject to the other provisions of this Part, trade and commerce and intercourse throughout the territory of India shall be free."

Naturally the taxes relating to inter-state trade and foreign commerce shall be prohibited to the States, as it was decided by the Supreme Court of the U.S.A. in the case of Brown vs. Maryland in 1827, that the power given to the Congress by Article 1 section 8 (3) is plenary and exclusive. In India by the Sixth Amendment Entry 92A has been added to list I of the Seventh Schedule, which gives the Parliament power to levy tax on articles which are used in inter-state trade. It is true that this deprives the States of substantial revenue. But "the great problem of any federal structure is to prevent the growth of sectional and local interests which are inimical to the interests of the nation as a whole."[11] So if the States impose taxes on inter-state and foreign commerce, that would destroy the national character of the economy. Hence commerce power is given to the general government in all federations.

Then again War power of the Federal Government also increases its power of taxation. The fact is that by the original Constitution of Switzerland (framed in 1848) only customs duties and no other power was given to the Federal Government. But during the War, inspite of the fact that Switzerland was not a belligerent country, she had to keep her army ready for more than four years. Naturally expenditure increased and decline of international trade led to the fall of customs revenue. So by amendments of the Constitution, the Government of the Confederation was allowed to enter into the field of direct taxation. Thus by the two amendments of 1915 and 1919, taxes on income, property and profits and by another amendment in 1917 tax on securities, insurance premiums and the like were given to the general government.

Both in Australia and Canada, the general government entered the field of taxation as a result of war. It was only after the first World War that the Australian Commonwealth imposed Estate duty in 1914 and income tax in 1915. In Canada during the first World War, that is, in 1917 the Dominion Government entered the field of taxation on income and during the Second

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[11] Basu, D. D.: *Op. cit.*, p. 733

Warld War, that is, in 1942, the Provinces were persuaded to vacate the field of income tax for the period of war. This arrangement proved permanent... The Provinces, of course, received in return grants. Until the first World War broke out, customs revenue was almost the sole revenue for the general governments. In the U.S.A. from 1909 a tax of 1 p.c. on Corporation income was introduced. Direct taxation was made necessary by the outbreak of war in 1914 and in 1917 when the United States joined the War, there was an increase in taxes on income, on war profit and excess profit. "The great increases in armament expenditure by the United States from 1940, followed by her participation in the War from 1941, raised the level of direct taxation to unprecedented heights. Personal and corporate income taxes were raised ; personal income tax was made subject to surtax and to a special victory tax ; corporation income taxes to a surtax and an excess profit tax. It was estimated in 1943 that 20 p.c. of the national income of the United States was being taken in taxation—a sum of between 24,000,000,000 dollars to 26,000,000,000 dollars, whereas in the first World War less than 10 per cent of the national income was taken. It was 5,000,000,000 dollars at that time. In 1945, the receipts of the United States Treasury from taxation amounted to nearly 48,000,000,000 dollars. Of that total, income tax produced 74 per cent and customs duties hardly 1 per cent."[12]

Thus we see how the original Constitutions of the U.S.A., Switzerland, Canada and Australia have been modified by the War power of the general Government and their power of taxation have become much wider than what was originally meant by the Constitution.

It may be argued that if the general Government did not impose tax on personal income, corporate income, and alcoholic liquors, the States could raise their revenues. But there was a chance that if the States imposed too high a rate of tax over any one of these items, there would be migration of the tax base to other States. This would be specially so in the case of India where freedom of movement including the movement from one State to another is guarranteed in the Constitution. This is why these taxes are imposed by the federal government.

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[12] Wheare, K. C.: *Op. cit.* pp. 109-110

Taxation of personal income by the national government and then the distribution of the proceeds among the States can be justified by another argument. It is true that low productivity reduces the per capita income of the States but as Blough says in his essay Fiscal Aspects of Federalism (an article in Studies in Federalism), in the U.S.A. persons from low income group argue that incomes in national economy are derived from a much larger area than the State and so the poorer States rightly deserve some portion of the tax revenues which are concentrated in a few industrial areas. But in the U.S.A., as Blough says, "The State Governments have shown little interest in having the federal government collect taxes for them in this manner. A somewhat similar proposal is for the federal government to impose a tax in excess of its own needs, assigning definite shares of the tax to those States to which the tax base could be allocated. This method would presumably reduce the costs of administration to states and the cost of compliance to tax payers. State Governments prefer to keep tax collection in their own hands, fearing that some future Congress might repeal the State share and prefering to maintain their own bureaucracies rather than strengthen the Central bureaucracy."[13]

It is natural for the States in the U.S.A. to raise objections against collection of taxes by the Centre but in India the provisions on which the Centre-controlled taxes are based, are part of the Constitution (Articles 268, 269 and 270). Hence the question of objection by the States cannot rise. The Centre here raises taxes in excess of its needs and distributes them among the States not so much according to their contribution as according to their population. That is to say, more attention is paid to the need than to the contribution. The States here have got little to fear that a future Parliament will reduce their share because according to the provisions of the Constitution, the share of the States will be decided by the President according to the recommendation of the Finance Commission, which will be instituted at regular intervals, that is, at an interval of every five years. It is true that the Central bureaucracy is strengthened by such provision but the disadvantages accruing from them are compensated by the equitable distribution which is expected to follow from it.

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[13] An Article by Blough in Studies in Federalism, pp. 396-397.

Grants-in-aid in some form or other have been used by all the federal governments. There is one section of people who argue that grants-in-aid threaten federalism as they are the means of bringing the States under complete domination of the federal governments. Moreover, if the States feel that some one else is paying for them, they will naturally become indolent and will be negligent about expenditure giving rise to extravagance.

In fact no system can be entirely good or bad and that is why, the best course possible to adopt in connection with grants-in-aid would be to retain them but to minimise their defects. In most cases it has been found that grants-in-aid have been necessary at the experimental stage, that is to say, when the States are launching into a new program and are not sure about the steps to be taken. In such cases temporary grants may be made to them. Then again block grants or unconditional grants may be made which will not lead to the domination of the State governments by the federal governments. But about shared taxes, we can say this much that the nature of some of them preclude any chance of their imposition or collection by the State governments. We have already discussed the cases of income tax, corporation tax and estate duty. Thus by the provisions of the Indian Constitution, they are sometimes levied by the Centre and the States collect them, sometimes they are both levied and collected by the Centre and the States enjoy their proceeds. Such shared taxes are generally unconditionally distributed among the States. If the Centre did not levy but only collected them, we could easily call the Centre to be the agent of the States. Of course, this is not the case. But the fact that there is no particular condition attached to the spending of the respective shares of the States, gives them considerable freedom and it can in no way be said that the States are the agents of the Centre.

Naturally the question arises, what restriction does the financial reality place on the federal system ? The answer is that in the complexity of the modern world, where benefits are diffused, state financing powers are limited and the needs of the federation and those of the States are sometimes overlapping, the federal financial system will be a mixed system. That is to say, some federal functions will be financed by the federation, some state functions will be financed by the States and most functions of

joint interest (of the federal and State Governments) will be financed by the federation and the States together. In a new sense it can be called a system of mixed economy. K. C. Wheare who is recognised to be the author of the best traditional definition of federation (as a system in which the general and regional governments are, each within a sphere, co-ordinate and independent), himself says "There is and can be no final solution to the allocation of financial resources in a federal system. There can only be adjustments and re-allocation in the light of changing conditions."[14]

Under these circumstances, it can be said that the Indian Constitution presents a practical method with its provision for tax-sharing and the institution of the Finance Conmission at regular intervals in order to decide the respective shares of the Centre and the States against the background of the everchanging needs of both. The experience of other federations has clearly shown that there cannot be any final and permanent settlement with regard to these matters and the Framing Fathers of the Indian Constitution have shown their wisdom in taking count of this practical situation instead of depending on any theory of a perfect federation with a division of the general and regional governments into watertight compartments.

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[14] K. C. Wheare : *Op. cit.* p. 123.

CHAPTER XV | CONCLUSION

Reviewing the entire question of the division of powers in the Indian Constitution, we find that from the very beginning, it has been subjected to criticism by eminent constitutionalists like K. C. Wheare and Sir Ivor Jennings. In fact, long before the establishment of federation in India, A. V. Dicey pointed out certain shortcomings of the federal government in general. Federal government, according to him, means weak government, conservative government and a government in which legalism is prevalent. This is because the powers of one authority are limited by the powers of the other authority, and none of the two authorities is sovereign. Then again, in order to ensure that both the authorities are kept within the limits of their constitutional powers, the Constitution is to be a written and therefore a rigid one. Thirdly, the predominance of the judiciary in the Constitution leads to the prevalence of the spirit of legalism among the people.[1]

The members of the Indian Constituent Assembly were always conscious about these remarks and they tried their best to soften down the edge of the criticism in the case of the Indian Constitution. Dr. Ambedkar pointed out, in his speech in the Constituent Assembly, that the Australian Constitution which adopted federalism at a later date than the U.S.A. tried to reduce the disadvantages following from rigidity and legalism inherent in federalism. The methods followed in Australia, as he said, were to confer upon the Parliament of the Commonwealth large powers of concurrent legislation and few powers of exclusive legislation and making some of the Articles of the Constitution of a temporary duration to remain in force only until Parliament otherwise provided. The Draft Constitution of India tried to assuage the two defects of rigidity and legalism by providing for a long list of subjects for concurrent legislation and also a long list of subjects for Central legislation.

Then Dr. Ambedkar spoke of the other attempts made to avoid rigidity. For this purpose provision was made for Parliament to legislate even in peacetime over subjects in the State

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[1] Dicey, A. V.: Law of the Constitution (ninth edition) pp. 171-175.

list provided the Council of States passed a Resolution to that effect by a two-third majority. This was Article 226 in the Draft Constitution and became Article 249 in the Constitution. Then he referred to a few other provisions designed to ensure flexibility. They are the powers of Parliament to legislate in national emergency as also to legislate with the consent of the States. These provisions later became Articles 352-360 of the Constitution.

Then Dr. Ambedkar referred to the second means adopted to avoid rigidity and legalism. This was the facility with which the Constitution could be amended. For purposes of amendment, he said, the Articles in the Constitution were divided into two groups, the first group relating to the distribution of legislative powers between the Centre and the States, the representation of States in Parliament and the powers of the courts. In the case of the Articles relating to this group, there can be no amendment without ratification by the States. Other Articles of the Constitution can be amended only by a double majority, namely a majority of not less than two-thords of the members of each House present and voting and by a majority of the total membership of each House.

Giving these details, Dr. B. R. Ambedkar said with emphasis, "One can, therefore, safely say that the Indian Federation will not suffer from the faults of rigidity or legalism. Its distinguishing feature is that it is a flexible federation."[2] But some of these very provisions, that is, all the provisions excepting those for amendment, came in for criticism from no less a person than Prof. K. C. Wheare. In Chapter XIII we have discussed the citicisms of Wheare and have shown that the right of the general government in India to interfere in State affairs is a common feature with the U.S.A., Canada and Australia. Prof. Wheare referred to Articles 249, 352-360 and 371 when he called the Indian Constitution to be a quasi-federation.[3]

Prof. Alexandrowicz says, "In the expression 'quasifederation', the word 'quasi' hints at a deviation from the federal

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[2] Ambedkar, B. R.: Motion re Draft Constitution, Constituent Assembly Debates, Vol. vii, No. 1, p. 36.

[3] Wheare, K. C.: Federal Government, p. 28.

principle without indicating what kind of special position a particular quasi-federation occupies between a unitary state and a federation proper."[4]

It seems to us that just as confederation iindicates a system of government in which the units have more powers than in a federation, so in a quasi-federation, the Centre has more powers than in a federation. In other words, the units in it are mere administrative divisions of the Centre. Another distinction between the two follows from this. A confederation is a temporary union between sovereign independent states, while a quasi-federation like a federation proper is a permanent union. Now, Articles 352-360 can operate only temporarily and by the provisions of the Articles not only the federal from can be switched off into a unitary one but after a short period there can be re-conversion. But can we question the federal character of the Indian polity because of this two way convertibility ? In the case of Punjab, PEPSU and Andhra[5] we have seen that the constitutional machinery failed in these States. Then and then only the Centre assumed power but that also for a very short period, that is so long as the normal Parliamentary government could not be re-established.

Article 371 also was put to test in the Mysore case. As the chief justice of Mysore was the victim of a criminal offence, the President of India gave an order to transfer the case to another State. The Legislature of Mysore urged the ministry to ask for withdrawal of the order. The Chief Minister of the State said that his government knew that according to Article 356, non-compliance of a state with the President's order might be considered as a failure of the Constitutional machinary, but they were determined to constitutionally resist the Central intervention. The President withdrew his order and the State of Mysore was exempted from Article 371*[6]. Thus there was no necessity to submit its budget for the approval of the President or to appoint a Councillor from the Centre to the State. Mysore started the movement and Travancore-Cochin as well as other part B States followed suit. After the re-organisation of States, the question of Central

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4 Alexandrowicz Henry : Constitutional Developments in India, p. 158.
5 All these have been discussed in Chapter xii.
6 The Indian Express, 9th December, 1951.

control over Part B States has become obsolete but even during the short period before re-organisation local Parliamentary machinary prevailed over any tendency for centralisation that might be inherent in the Indian Constitution.

While discussing the provisions of Part xi of the Constitution, that is the provisions governing the administrative relations between the States and the Centre, Ivor Jennings has said,

"It is not difficult to imagine a conflct between a Congress Government of the Union and a non-Congress government of a State. Possibly-though the question needs investigation itwill be possible to get a mandamus against a State which refuses to comply with directions ; but is it proposed to put a State Government into jail for contempt of court ? Probably the remedy would be for the Governor to dismiss his Ministers"[7].

But the Mysore case has shown the fact that neither the State Government was put to Jail for non-compliance with directions, nor was the Governor compelled to dismiss the ministry. Of course, Mysore government was not one belonging to a different party from the Centre. But any how the main point in the remarks of Jennings was the condition that would arise if there was disagreement between the two authorities and the Mysore case has shown that the Centre in India is quite willing to give in where the demand of the States is a genuine one.

The idea is supported by Sir Perceival Griffiths also. He says, "Perhaps the most important characterisitc of the Indian Constitution is that the balance of power necessary in any federation is tilted in favour of the Federal Centre against the constituent states"[8].

Then he mentions the privisions in the Constitution which are likely to make the Centre stronger than the units. They are the residuary powers and emergency powers of the Centre as well as the Centre's powers over defence, international relations, ports, railways and currency.

Thus he says that the framers of the Constitution succeded in creating a strong Centre.

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[7] Jennings Ivor : Some Characteristics of the Indian Constitution, p. 69.
[8] Griffiths Perceival : Modern India, p. 121.

"The States nevertheless, "says Sir Perceival Griffiths, "cling jealously to the considerable powers they possess and are not unduly influenced by the advice of the Federal Government. In 1954, for example, they steadily resisted the attempts of the Central Finance Minister to bring about some uniformity in the administration of State sales taxes while some of them have initiated a policy of prohibition, against the consistent advice of the Central Government. . . . In reality the relations between the States and the Centre depend more on politics and personalities than on legal definition and some observers doubt whether the ascendency of the Centre will be maintained when Nehru ceases to be Prime Minister"[9].

Henry Alexandrowicz suggests this test of a federation, "The existence of a federation proper may. . . . . be presumed if the responsibility of the local Executives to the local legislatures or the position of locally elected Governors endowed with real power mean what they were intended to mean constitutionally. Such local responsibility is sufficient proof of internal independence"[10].

The Mysore case shows that the local executives in the Indian States (That is, the units) are responsible to the local legislatures and there is no unnecessary and unjustifiable supremacy of the Centre over the units. The provisions for emergency are purely temporary affairs and the two way convertibility proves the federal character of the Indian Constitution.

Dr. Ambedkar said in the Constituent Assembly, "The Indian Constitution proposed in the Draft Constitution is not a league of States nor are the States administrative units or agencies of the Union Government."[11]

In support of this remark of Dr. Ambedkar, we can refer to the re-organisation of States. At the time of the establishment of the federation the map of India was a mosaic with a heterogeneous composition of the units. As the former Princely states had recntly acceded to the Indian Union and had to transform themselves from autocracy to democracy, things were in a continual flux. So the Constituent Assembly thought it better

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[9] *Ibid.* p. 122.
[10] Alexandrowicz Henry, *Op. cit.*, p. 159.
[11] Dr. Ambedkar : Motion re Draft Constitution, Constituent Assembly Debates, Vol. vii. part 1, page 33.

to leave some scope for easy territorial re-adjustments. As such Article 3 of the Constitution provides that Parliament may form new States or unite two or more States, change the territory of the existing States and alter their boundary or name. For the sake of speedy-reorganisation, the special procedure for amendment according to Article 368 has not been required here. Thus soon after the inauguration of the Federation, A States Re-organisation Commission was instituted by the President. It issued its fiinal Report on September, 30th., 1955.

Following the remark of Dr. Ambedkar in the Constituent Assembly, the States Re-organisation Commission made the remark,

"A federal union, such as ours, presupposes that the units are something more than creatures of administrative convenience."[12]

Then they continued,

"The constituent States in a federal republic must each possess a minimum degree of homogeneity to ensure the emotional response which is necessary for the working of democratic institutions. The States of the Indian Union can achieve this internal cohesiveness only if they are constituted on a unilingual basis because language being the vehicle of the Communion of thought and feeling, provides the most effective single bond of uniting the people."[13]

The recommendations of the States Re-organisation Commission were, however, based not only on linguistic considerations but also on economic, financial and administrative viability of the States and over and above that, on the "bargaining and negotiating vigour of linguistic communities."[14] The result is that with a few exceptions, most of the States are now unilingual States.

Punjab is still a bilingual State and Assam, a State with heterogenous population, although there is persistent demand from the Sikh people to obtain a different State for the areas in which the Sikhs are in heavy concentration of number.

Whether linguistic States are justifiable or not is a separate point but the very fact that the Centre had to take action due

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12 S. R. C. Report, para 119.
13 *Ibid.*, para 119.
14 Alexandrowicz Henry : India Before and After Re-organisation : an article in the Year Book of World Affairs 1958, p. 146.

to the popular demand in the States shows that the States are not mere administrative units of the Centre.

When we examine the working of the Indian Constitution, the charge of Dicey that federal government is conservative government is also disproved by facts. First of all, we see the various amendments which have been done so quickly after the inauguration of the federation. Of all these the amendment with regard to sales tax which was made in order to solve the problem raised by the case of Bengal Immunity Company Limited vs. The State of Bihar, deserves special mention.[15]

Then again we find the institution of the Zonal Councils. When in the winter of 1955, the States Re-organisation Commission submitted its Report and it was being debated in the Lower House of Parliament, it was feared that many controversial issues would arise out of the re-organisation of States. On December 21st, Mr. Nehru intervened in the Debate and proposed that following the reorganisation of States, India should be divided into four or five regions in which advisory Zonal Councils would be established.

The suggestion was welcome to the members of the House as they thought that the zones would be the means of developing the habit of co-operation and overcoming the habit of divisiveness inherent in linguistic sectionalism.

On January 16th, 1956 the Government of India released its communique on the States Re-organisation Commission Report. Several paragraphs of it were devoted to the establishment of the zonal councils. The communique had put forward the proposal for five zones but when the proposal was given a statutory form in the States Re-organisation Act.,[16] there was the important difference between the provisions of the two in this, that the State of Mysore, which was proposed in the original communique to be linked with Madras and Kerala to form the Southern Zone, was finally united with Bombay to form the Western Zone. Then the Act made provision for five zonal councils in the following way :

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[15] Supra, pp. 213-218.
[16] The States Re-organisation Act, 1956 part iii.

(a) The northern zone comprising of the States of Punjab, Rajasthan, and Jammu and Kashmir and the Part C States of Delhi and Himachal Pradesh.

(b) The Central Zone comprising of the States of Uttar Pradesh and Madhaya Pradesh.

(c) The Eastern Zone comprising of the States of Bihar, West Bengal, Orissa and Assam, and the Part C States of Manipur and Tripura.

(d) The Western zone comprising of the States of Bombay and Mysore ; and

(e) The Southern zone comprising of the States of Andhra Pradesh, Madras and Kerala.[17]

It was provided that the zonal councils shall consist of the following members :

(a) A Union Minister to be nominated by the President ;

(b) The Chief Minister of each of the States included in the Zone and two other ministers of each of the States. These members were to be nominated in the case of Jammu and Kashmir by the Sader-i-Riyasat and in other cases by the Governor.

Even before the plan materialised, that is to say, after Shree Nehru's proposal for it, it had a mixed reaction among the political parties and in the Press. During the debate in the Andhra Assembly early in April 1956, P. Sundarayya said that the zonal councils would eventually mean zonal states and they would bring to naught the unity of linguistic States.[18] But in the Press we find also favourable remarks about the Zonal Councils. For example, the Amrita Bazar Patrika said that the Zonal Councils could aid in solving the problem of linguistic minorities remaining in the various States and they would create a healthy atmosphere in breaking down the feeling of exclusiveness and promote a co-operative spirit*[19].

It was expcted that the Zonal Councils would help in lowering the linguistic barriers and promote inter-State co-operation with

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17 *Ibid.*, part iii.
18 Reported in the Hindusthan Times, April 5th, 1956.
19 Amrita Bazar Patrika, December 23rd, 1955.

regard to river valley projects. The Times of India remarked, "The Zonal councils can not only ensure a higher degree of co-operation in the implementation of these and other projects but also in the pooling of experience in other fields*[20].

The first meeting of the Northern Zonal Council was held in Delhi. It was inaugurated by the then Home Minister Pandit G. B. Pant on Apirl 23rd, 1957. The Statesman reported that, "Tha New Delhi meeting was promising for a number of constructive suggestions about, among other things, inter-state transport. irrigation, and power, man power, planning and pooling of officers and technical personel and an inter-state reserve police force were made and willingly accepted"[21]. Among other things, stress was laid by Mr. Pant on "emotional integration" healing the wounds of separation, bringing about political equilibrium and the protection of minorities. But apart from this negative aspect, there was also the positive element concerning co-operation in development and planning. After this report, the Statesman observed, "machinary for resolving inter-state dispute must exist and if they can be settled by majority vote in an advisory body all the better. If dire human problems like the resettlement of refugees can be more effectively tackled through the councils their reputation will only grow"[22].

As linguistic difference was not a dominant feature of the Northern zone, the meeting of the Council was dominated by consideration of constructive planning like development of trade, construction of bridge, supply of water, and power to some areas of Jammu and Kashmir from Punjab.

The first meeting of the Eastern Zonal Council was held on 30th April, 1957 at Calcutta. The meeting was held to be a co-operative venture for the maximisation of benefits. Among other things, like industrialisation of the zone, which might be helped by the mineral resources of Bihar, the man-power problem which was to be tackled for the successful implementation of theSecond Five Year Plan, solution of the food problem, provision for common

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N.B.: As the Proceedings of the meetings of the Zonal Councils are considered to be secret documents by the Government of India, they are not available to the public. So I have mainly depended on newspaper reports.

[20] Times of India, December 23rd, 1955.

[21] Reported in the Statesman, April 26th, 1957.

[22] The Statesman April, 26th, 1957.

police Reserve Force, the Council discussed the pressing problem of the resettlement of the refugees.

The Central Zonal Council met for the first time at Lucknow on May 2nd, 1957. It considered a memorandum from the Planning Commission for revised food production target and related problems like irrigation, transport, law and order in the countryside, road transport and joint police command for the suppression of decoity.

The question of easing restrictions on inter-state road transport was considered in this meeting as it had been done in the meeting of the Northern Zone. The Council agreed that immediate steps should be taken to acquire lands on both sides of the border of Madhaya Pradesh and Uttar Pradesh for the re-settlement of the villagers displaced by the completion of the Rihand dam.

When the Southern Zone was formed, its most prominent feature was the exelusion of Mysore, which was grouped with Bombay to form the Western Zone. However, Mysore was invited to be permanently represented in the meetings of the Southern Zonal Council for taking part in the regional decisions of the South. The Southern Zonal Council met at Madras on July 11th, 1957. The meeting considered two notes submitted by the Planning Commission. One of them mentioned the recasting of State Plans in view of the re-organisation of the States. In fact the boundary of the Southern Zonal states had greatly altered due to the reorganisation of States, as a separate Telegu-speaking State of Andhra had been formed, parts of Madras were transferred to Mysore, there was an exchange of territory between Madras and Travancore-Cochin (Kerala). Part of Hyderabad was included in Mysore and part of it in Andhra. Hence recasting of state plans was necessary. Another note submitted to the Zonal Council by the Planning Commission referred to the agricultural production programme to raise the food target in the Zone. A committee was appointed to inquire into the adjustments required in the five year Plans of the several states and a sub-committee was appointed to inquire into the deficiency of man power and for making suggestions for training programe. When the meeting of the Southern Zonal Council was over, the Chief Minister of Mysore Mr. Nijalingappa expressed satisfaction with the Council's decision to invite Mysore to participate in the

meetings of the Southern Zonal Council. The Deccan Herald interpreted it to be dual membership of Mysore.[23] The Western Zonal Council met on September 20th in Mysore. The Council appointed a committee to investigate interstate man-power resources, to co-ordinate power generation and to recommend the development of the transport system in the two states.

Writing in June 1958, Shree Dhirendranath Sen expressed the fear that,

"The Re-organisation Act with its provisions for Zonal Councils marks a step forward towards centralisation which, in effect, is tantamount to a corresponding reduction in the operational autonomy of the States."[24]

Referring to the fact that all questions at the meetings of the zonal councils would be decided by majority votes and in case of a tie, the chairman (a Union Minister appointed by the President) would have a casting vote, Shree Sen wrote, "Each Zone may, in such circumstances, tend to develop into an intermediary super-state in the three-tier mechanism with the result that the States will be left with nothing to chew or bite."[25]

R. B. Chande, Working President of the Madhaya Pradesh Ram Rajya Parishad observed,

"The fact remains that any Council in which the Centre is represented, will be an overlord of the various State Legislatures and in actual practice its 'advice' may turn out to be an order."[26]

But as the Union Home Minister said in the Meeting of the Northern Zonal Council, on April, 23rd 1957, the idea of inter-state co-operation was nothing new. In other countries, having a federal form of government, he said, efforts were made to evolve a common approach to problems of inter-state character. In the United States beginning with inter-state parole and probation compact of 1934, collective state action, had been utilised to promote inter-state co-operation in such fields as the abatement of water polution, conservation of oil and gas, development of inter-state parks, and conservation and development of Atlantic marine fisheries. Then he mentioned the annual Governor's

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[23] The Deccan Herald, July 14th, 1959.
[24] Sen Dhirendranath : The Paradox of Freedom ; p. 21.
[25] *Ibid.*, p. 21.
[26] Reported in the Hitavada, December 27th, 1955.

Conference, which was initiated in 1908 and was meeting regularly.

So the Zonal Councils in their approach to solve interstate problems are not entirely new ventures, at least, the aim is not new. Much of the apprehension of Shree Sen about the possibility of the Zones becoming super-states, is warded off by the fact that the decisions of the Zonal Councils are advisory in character. The recommendations of the Councils, are however, of supreme importance in the context of the modern inter-state dependence. Joan V. Bondurant has rightly observed,

"As technological and economic advances are made, the several parts of India will undoubtedly become increasingly interdependent. The events of the past decade suggest, however, that the administrator, the physio-agronomist, the planner may never be free from, what may appear to him to be obstacles growing out of movements representing particularist sentiments transformed into political objectives. Such is the price of diversity. The discovery and development and application of the processes and machinary through which unity in diversity may be secured is the task of statecraft."[27]

The fear that the Zones might end in the absorption of the States or might develop into powerful bodies between the Centre and the States has not yet been realised. On the other hand, the decision to bifurcate the Bombay State on linguistic basis shows that whatever device for interstate co-operation may be provided, popular sentiment cannot and will not be ignored by the politicians of India. As to the importance of the Zonal Councils, we may mention the fact, that apart from the necessity of inter-state co-operation for successful planning, the problem of linguistic minority will always remain inspite of all re-organisation of States and unless a forum for interstate discussion is provided, there will be popular agitation over the problems of language, boundary etc. which will be detrimental to the smooth working of the administrative machinary.

The quick decision of Indian politicians to institute Zones and Zonal Councils both for 'emotional integration and economic planning, shows that Indian federalism does not involve

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27 Bondurant Joan V.: Regionalism *vs.* Provincialism published by the Institute of International Studies, University of California, p. 148.

so much conservatism as was apprehended by A. V. Dicey in his Law of the Constitution.

If this is the case, the question naturally arises—do we have an ideal federation in India ? In other words, is there no scope for improvement ?

In this connection, we remember, the remark of Prof. K. C. Wheare that in a federation, the general government and the units should have co-equal powers. "In a federal Constitution", writes Wheare," the powers of government are divided between a government for the whole country and governments for parts of the country in such a way that each government is legally independent within its own sphere. The government for the whole country has its own area of powers and it exercises them without any control from the governments of the constituent parts of the country and these latter in their turn exercise their powers without being controlled by the Central Government."[28]

Though we do not accept Wheare's definition to be the last word about federations, yet it is true that on the whole the two authorities should have co-equal powers without any touch me not attitude.

Now according to Articles 3 & 4, no special procedure (as followed in constitutional amendments) is necessary to alter the boundary of a State or to admit a new territory. Originally this provision had its importance because the division of States into Parts A, B, C and D was purely a temporary affair. Now that re-organisation of States has taken place and geographical distribution of territories is more stabilised now, it is high time to amend Articles 3 and 4 and require the special procedure for changing State boundaries. Otherwise the very existence of the units of the federation may be in danger of obliteration, not to speak of the powers they enjoy.

Secondly, according to Article 169 (1) Parliament may by law create Legislative Councils for States which do not have them and abolish them where they exist. This provision might have been necessary at the time of the inauguration of the federation when there was gradation in the rank of the States. Now, after re-organisation, the retention of Article 169(1) militates against

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[28] Wheare, K. C.: Modern Constitutions, p. 27.

the federal principle because it gives power to the union alone to deal with such a vital matter as the existence of one House of the Legislature in a State. In our opinion this provision should either be abolished or there should be a provision that in case of the abolition of State Councils, Parliamentary Resolution must be ratified by the Assembly (or Assemblies) of the State (or States) concerned. When we examine the composition of the Council of States, we find unequal representation of the units.[29] We advocate equality in the number of representatives from each State. In fact one of the reasons of having a second chamber in a federation is to represent the States as States. In our Constitution, unequal representation of the units in the Council of States reduces to a great extent the necessity of the second chamber. So we hold that the Constitution should be amended to provide equal representation to the States in the Council of States. This is especially required because legally speaking, the units are equal irrespective of their size and population.

The Kerala upsurge leads us to consider another question. Parliamentary government which had not lost majority in the Legislature was upseated due to popular demand. A question naturally arises here. Would it be wiser to have a system of recall by which the local electorate would have the right to request the resignation of a member ? Herman Finer strongly objects to this system in the following words, "Its institution would be an encouragement to all minorities to offer petitions against the sitting member. At some time, in the term of a Legislature, its work could be disrupted by such a concerted onslaught. It is, therefore, of cardinal importance that for the sake of the regular march of business, for stability and for the assurance of being able to reckon on the governmental events of the near future, some surrender of the immediate will of the electrorate must necessarily occur for the nature of modern economy and welfare requires legislative and executive stability."[30]

In a country like India, where the majority of the electorate are uneducated, the system of recall would create havoc. Wherever a Parliamentary government prevails and the Government is defeated in the legislature, they can approach the Governor for

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[29] Fourth Schedule to the Constitution of India.
[30] Finer Herman : Theory and Practice of Modern Government, p. 376.

a dissolution of the Assembly before the expiry of their legitimate term. It is their prerogative to get such a dissolution and ask for a fresh election. Excepting this, to institute a system of recall would make the government unstable.

So much about Constitutional reforms. Coming to the question of conventions, we find that in order to keep the federal structure intact, India needs the development of one healthy convention. It is that Governors should always be chosen from persons who are above party politics, because it is the Governor, who is to see that the government of the State (i.e. the units) is carried on in the interest of the people and not in the interest of the governing party. To win the confidence of the people in general, governors should keep themselves aloof from party politics. The convention which has developed of choosing persons from outside the State as Governors, would be of much help in keeping the Governors above local party politics but that does not provide any safeguard against their taking part in the national party politics. If they do so, they would be reduced to agents of the Centre. As Shree N. R. Deshpande has said,

"As the constitutional head of the State, the Governor must not only be above party politics in the State, but he must also not become an instrument of party politics on the national level. The constitutional provision for his appointment by the President should not be a lever for imparting national-level politics into State administration."[31]

He also says, "as the constitutional head of a state, the Governor has to play the very difficult role of not playing into the hands of his state cabinet as also of not becoming a mere instrument in the hands of the Union Government."[32]

An elected governor would have surely reduced the chance of the governor's imparting in national party politics but that would have ushered in conflict between the governor and the chief minister of the State. So in order to prevent the governor becoming an agent of the Centre, which will be detrimental to the federal structure of the Indian Constitution, a convention

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[31] Deshpande, N. R. The Role of the Governor in the Parliamentary Government in the States, an Article published in the Indian Journal of Political Science, January-March, 1959, p. 19.

[32] *Ibid.*, p. 21.

should develop that governors should be persons who have never taken part in party politics.

Dicey mentioned legalism as one of the characteristics of federalism. In fact, in a federation where the entire Constitution is based on division of powers, the importance of the courts as umpires deciding the limits of jurisdiction of each authority cannot be exaggerated. Thus Dicey says, "Federalism, lastly means legalism—the predominance of the judiciary in the Constitution—the prevalence of the spirit of legality among the people."[33]

Dicey refers to the condition in the U.S.A. and says that the Courts are the pivots on which the constitutional arrangement of the country turns.

Ivor Jennings remarks that the Indian Constituent Assembly was dominated by lawyer-politicians and that was why we find the predominance of the views of Dicey in the Constitution.

"Litigation," says Ivor Jennings, "is one of the major industries of India.....law is the only profession which may be easily combined with politics. The lawyer politician has therefore, played a more important part in Indian politics than in the politics of any country in the world....Whether the dominance of the Constituent Assembly by the lawyer politician has been good for India must be left for history to say."[34]

In every federation, the Supreme Court has been made the guardian of the Constitution. In the Indian Constitution also whenever there will be any question of the interpretation of the Constitution, an appeal shall lie to the Supreme Court (Article 132). In its original jurisdiction (under Article 131) our Supreme Court will be a true federal Court deciding disputes between (a) the Union and one or more States (b) the Union and any state or States on the one side and one or more States on the other side (c) two or more states against each other.

But at the very beginning of this Article, it is clearly mentioned that the Supreme Court will have jurisdiction over these subjects, "subject to the provisions of this Constitution." From other provisions of the Constitution, it appears that the Supreme Court will not have its original jurisdiction when a State is a party to a dispute arising out of a treaty, agreement, covenant,

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[33] Dicey. A. V.: *Op. cit.* p. 175.
[34] Jennings Ivor : *Op. cit.* pp. 24-25.

engagement, sanad and other similar instrument entered into the pre-Constitution days.[35]

Then again with regard to the disputes relating to waters, the constitution provides that Parliament shall by law provide for the adjudication of the disputes relating to the use, distribution or control of any inter-State river or river valley (Article 262), Clause (2) of the same article lays down that Parliament may by law deprive the Supreme Court or any other Court from the power of exercising jurisdiction in this matter.

Thirdly, the Supreme Court will not have any jurisdiction in matters referred to the Finance Commission as it is laid down in Article 280(4) "The Commission shall determine their procedure and shall have such powers in the performance of their functions as Parliament may by law confer on them."

As the Finance Commissions will from time to time make recommendations with regard to the distribution of the net proceeds of taxes between the Union and the States and the principle governing grants-in-aid, these will be exempt from the jurisdiction of the Supreme Court. Then again according to Article 290, there will be adjustment by agreement or arbitration of certain expenses and pensions between the Union and the States, by any arbitrator appointed by the Chief Justice of India.

So the Supreme Court which is to decide disputes between the Centre and the States, cannot do so with regard to a lot of matters and they will have to be decided either by a Commission or an arbitrator. So a big portion of the financial relation is exempted from the decisions of the Supreme Court.

Then again Article 263 lays down, "If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of—

(a) inquiring into and advising upon disputes which may have arisen between States ;

(b) investigating and discussing subjects in which some or all of the States or the Union and one or more of the States, have a common interest.....

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[35] Proviso to Article 131.

it shall be lawful for the President by order to establish such a Council....."

So the inter-state councils also will have the power of deciding disputes between the States. As Shree Arunachalam says,

"In view of the increase in the Central activity in matters of common concern to the States, it may be useful to have in a big size federation, a common agency which will facilitate the meeting of provincial or state representatives to discuss matters of common concern in order that a uniform policy may be followed....."[36]

In so far as the inter-state councils will decide disputes, they will be substitutes for the Supreme Court but so far as they will act as means of co-ordination of activities of the different states, they will be in line with the Zonal Councils.

Ivor Jennings is afraid that the length of the Constitution will extend the jurisdiction of the Courts in many undesirable matters. It is true that at places the Constitution is unnecessarily lengthy, for example, in the three lists under the Seventh Schedule many provisions have been repeated, which if avoided could have simplified matters. The reason behind this tendency of the members of the Constituent Assembly, is that they did not want to leave anything vague. But later on, it was decided, in the case of A. K. Gopalan vs. the State of Madras, that the Court is not to judge the reasonableness of a law passed by Parliament.[37]

This shows that our Constitution makes a compromise between the doctrine of judicial review as followed in the U.S.A. and the doctrine of Parliamentary supremacy as followed in the United Kingdom. In interpreting the Constitution, the Supreme Court will, of course, have the power of ultimate decision. But the Court, in interpreting the Constitution, will not put any strict and literal interpretation on the words used in it, but will put liberal interpretation. This does not reduce the chance of litigation but the apprehension that the Court, by way of inter-

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[36] Arunachalam, N. A.: Treatise on Constitutional Law, p. 419.

[37] A. K. Gopalan *vs.* The State of Madras (1950). It was a case of Preventive detention. The petitioner was detained under a Preventive detention Order made under Act iv of 1950, which was passed by the Parliament of India. The view of the majority was expressed by Chief Justice Kanaia, that the reasonableness of a law passed by Parliament cannot be questioned by the courts.

preting the Constitution, may reduce the powers of either of the two authorities, proves unjustifiable.

The reason why the Constitution of the United States of America is the shortest possible constitutional document, is not far to seek. They were beginning from the scratch with no tradition of true federal government behind them, while we have not begum with a clean slate. The bureaucracy left by the British had to be fitted into the general scheme, concessions had to be made to the various competing interests, a compromise had to be worked out between the provisions to check governmental tyranny on the one hand, and to help social and economic planning on the other hand, which need more and more governmental control. A federal constitution, by its very existence, invites the judiciary to have a great importance. It is proved by the fact that the shortest Constitution in the world, viz. The American Constitution could not prevent the judiciary from becoming all-important. Whether in India it will become more important or not is a thing still to be seen.

Ivor Jennings, in his 'Some Characteristics of the Indian Constitution,' also speaks against the alleged rigidity of the Indian Constitution. The framers of the Constitution, as mentioned, tried to avoid it by allowing the Constitution to become unitary or flexible according to necessity. But Jennings found fault with the method of amendment.

"A Constitution", he says, "which can be changed only by special formality is necessarily more rigid than one which can be changed by ordinary legislation"[38].

K. C. Wheare thinks that this is a merit of the Indian Constitution. "The amending process must be so devised", says Wheare, "that neither the Central government acting alone nor the constituent governments alone can alter the division of power in the Constitution. It is usually considered best that some form of amendment which involves joint action by the Central government and the constituent governments should be adopted. This is the position in the United States where amendment of the Constitution may be made if the proposal is passed by a two thirds-majority in

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[38] Jennings Ivor : *Op. cit.* p. 9.

each House of Congress and is thereafter accepted by a vote of the legislatures of three quarters of the states. A similar provision is found in the Constitution of India, so far as amendment of the division of powers is concerned, though the consent of the legislatures of one half of the states will suffice."[39]

The very existence of federation requires some rigidity in the process of amendment. Otherwise the division of powers on which the life of federation depends, may be altered according to the whims of the party in power. Of course, temporarily the Centre can assume power almost on its own initiative, as in the case of Article 249. Whatever may be said against the provision of this Article, the only redeeming feature is that, it is not an amendment of the Constitution. That is to say, whatever power the Centre may assume, will only be temporarily exercised by it.

Jennings spoke against the rigidity of the Indian Constitution because he has been brought up in the English tradition where the Constitution cannot be found in a single written document. Moreover his attention was concentrated on the federation in the U. S. A. where the federal Constitution is the result of treaty between different units which had already developed local patriotism and were unwilling to hand over too much power to the Centre. But later on, the Centre, by judicial interpretation developed much more power than was originally given to it by the Constitution. India, on the other hand, was not framing its Constitution by treaty between the different units. It was a unique process of decentralisation of the administrative units of the Centre which ended in granting autonomy to the Provinces by the Government of India Act of 1935, and then bringing them together into a federal system after independence. Yet the British Indian Provinces occupied only three-fifth portion of the whole of India. The rest had to be brought within the system. The States Re-organisation Commission rightly observed,

"It has to be realised that the political unity of India is a recent achievement. It was not, as is generally supposed, brought about by the administrative unification of India by the British."[40]

At another place the Report says,

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[39] Wheare, K. C.: Modern Constitutions, pp. 125-126.
[40] States Re-organisation Commission Report, para 147.

"Even what was British India did not achieve a real measure of unity. It was the determination of the Indian people to rid themselves of foreign domination and to build up a life for themselves as a free people that created the present unity of India, sweeping away not merely the alien rule, but also the hereditary Rulers who had divided up India and thus stood in the way of that unity. But this sense of Indian unity is a plant of recent origin. It has not only to be watered and nourished but protected against hailstorms and gales and against unfriendly climates."[41]

So the newly achieved unity of India had to be protected. So long as India was not independent, the Muslim League apprehended the domination of the Provinces by the Hindu majority at the Centre and wanted a weak Centre. This is why both in the Cripps Proposal and in the Cabinet Mission Plan, there was the proposal for a weak Centre. But once Pakistan was formed and there was no necessity to make concession to the demands of the Muslim League, a strong Centre was thought to be a necessity to prevent various disintegrating tendencies in the country. Then again there was the question of international relations. When the Constitution was framed, the world had not got over the nerve-wrecking shock of the devastating second World War. The Power Blocks were still there in a condition of suspended animation. India wanted to remain neutral. Yet there was no knowing when she would be entangled in the struggle of the Big Powers. So defence was a vital question, and in order to ensure that even at the slightest notice the whole resources in men and materials available in different parts of the country could be utilised by the Centre, there was the dire necessity for the provision of switching off the Constitution into a unitary one during emergency periods.

There was also the need of building up the economic life of India, which needed the utilisation of her resources. Social planning has become a Central responsibility in almost all countries because it needs standardization. But in India it became all the more important because with her newly achieved independence, she had to build up her economic life anew.

These necessitated a strong Centre and in order to save the necessary provisions from the whims of any party in power, many of the provisions are embodied in the Constitution.

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41 *Ibid.* para, 148.

K.M. Panikkar has truly said, "The purpose which the Founding Fathers had in view was not only to hold in check the fissiparous tendencies which led to the disruption of former empires, and to maintain the unity which had been achieved after so much struggle, but to endow the Central government with all powers necessary in the political and economic field to enable India to undertake a policy of planned development which would raise her to the position of a modern nation, unhampered by the statutory rights of State governments."[42]

But it is unfair to call the units in the Indian federation mere administrative units. Because when we look at the mature federations of the U.S.A., Australia and Canada, we find that in practice the States in India are not more dependent on the Centre than in these countries. While thinking about these federations, we recall the grants-in-aid made by the Centre which have become a regular feature of federal economy, and everywhere we find that he who pays, always tries to control.

After all, can we justify the charge of quasi-federation against the Indian Constitution ? A federation proper, as we have said before, must have "Constitutional division of powers with the provision that each member of the federation must be wholly independent in the exercise of those powers which concern itself alone."[43]

In this connection, we have to consider how many of the powers concern the units alone. The Centre is getting interested in more and more subjects. By modern technological developments and the expansion of small village markets into the world market, more and more subjects are becoming subjects of not only national but international concern.

Moreover we are no longer living in an age of laissez faire. The principle of "that government is the best which governs least", is an ideal which has receded into the past. The welfare State requires more and more services from the government. Hence economic and social planning are necessary and in such planning all the conflicting parochial interests have to be reconciled. If the natural resources and the man power of a country have to be

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[42] Panikkar, K. M.: Common Sense About India, p. 44.
[43] *Supra*, pp. 3-4 (Chapter I).

fully utilised, planning can only be at the national and not at the provincial level. To diffuse the social benefit throughout the country and to avoid discrimination, taxation has to be on a national basis.

In such a case, a question can be legitimately asked—Whether the federal form of government should be retained at all. But the fact is that federation places people at a point of vantage in realising their particular local interests while it unites them together for some common purposes. The very fact that the Indian States had to be re-organised mainly on linguistic basis, shows that it is not possible to have a unitary Constitution in the country. Social and economic planning, which is an essential part of modern civilised existence, necessitated such linguistic re-organisation.

So the definition of federation has to be recast since the pre-War definition does not suit the post-War developments. During the War, all values were in the melting pot and the pattern of world politics has changed in the post-War days. Thus in the new federations formed after the Second World War, viz. those of Nigeria and Central Africa, we find a list of concurrent powers. This is because modern federations do not envisage absolutely parallel system of authorities but co-ordination and co-operation between the two at various points, is now needed. This is why federal legislation is now controlling social welfare in the States and the latter as recepients of benefits from the Centre, often acquiesce in the policies of the Centre. This is the case in the U. S. A., Canada as also in Australia. A little bit of standardisation follows, yet it is inevitable.

So instead of saying that India is a quasi-federation, we have to examine the extra-constitutional growth in older federations and have to judge the claim of India to be called a federation. In fact 'federation' as a constitutional form requires a new definition which is to improve upon the traditionally accepted definitions of Dicey and Wheare. It has to recognise the prospect of co-operation between the two authorities. James Bryce made a wise remark when he compared the two sets of authority in a federation with the two machines in a factory, whose constantly revolving wheels are covering the same ground, whose bands are crossing

each other yet they are not interfering with the work of each other.[44]

After all federation is a compromise and has to meet the demands of both the diversity and the unity which is found among the people of a country.

As William S. Livingstone has said,

"The total pattern of the diversities produce a demand for some kind of federal recognition of the diversities. This demand must in most cases meet a counter demand....for increased unity of integration. These two demands or forces—the one impelling toward autonomy and independence for the component units, the other impelling towards centralisation and the suppression of the diversity-meet each other head on ; the result of the conflict is federal system. The federal system is thus an institutionalization of the compromise between these two demands, and the federal constitution draws the line of this compromise."[45]

As political science deals with human beings, we cannot depend on absolute principles. Without entering into the controversial question as to whether human nature is changing or not, we can safely assume that man's behaviour is changing, his needs are changing and the federal system of government, like every other social heritage of man, has to be improved and modified to suit the needs of the times. If we bear this in mind, then India can be definitely called a federation. The division of powers in the Indian Constitution, though not confining the two authorities to watertight compartments, establishes a practical federation, that is to say, a federation which is conscious of the trend of development in all other federations, and is capable of fulfilling the needs of modern India. There is no harm if it is not the carbon copy of the older federations. A carbon copy has much less value than the original. Our Constitution is sui generis. Yet it is undoubtably a federation, because it expresses the genius of the Indian people.

Law, including Constitutional law, as Montesquieu said about two centuries ago, to be operative, must be a reflection of the social,

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[44] *Supra*, p. 11 (Chapter 1).

[45] Livingstone William S.: Nature of Federalism, an Article published in Political Science Quarterly, March, 1952.

political and even the physical conditions of a people. The contemporary Indian polity, therefore, merely expresses the spirit of the Indian people, and it is quite proper to call it a federation of the modern type.

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